No. 2273

United States
Circuit Court of Appeals
For the Ninth Circuit.

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY, a Corporation, Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO, a Corporation,

Appellee.

Supplemental Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, First Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

At a stated term, to wit, the October Term, A. D. 1913, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the fourth day of May, in the year of our Lord one thousand nine hundred and fourteen. Present: The Honorable WILLIAM B. GILBERT, Circuit Judge; Honorable ERSKINE M. ROSS, Circuit Judge; Honorable WILLIAM W. MORROW, Circuit Judge.

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PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY, a Corporation, Bankrupt,

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Appellee.

Order on Motion of Appellee for a Writ of Certiorari for Diminution of the Record or for Correction of Omission from Record by the Filing of a Supplemental Transcript of Certain Portions of the Record and Evidence.

ORDERED, motion of counsel for the appellee for a Writ of Certiorari for Diminution of the Record under Rule 18 of this Court, or that this Court may direct that certain omissions from the Transcript filed herein may be corrected by a supplemental transcript properly certified, printed and filed

herein, under Rule 76 of the Rules of Practice in Equity, argued by Mr. Charles J. Heggerty, counsel for the appellee and on behalf of said motion, and by Mr. C. A. S. Frost, counsel for the appellants and in opposition to said motion, and submitted to the Court for consideration and decision.

Thereupon, on consideration thereof, and the Court being fully advised in the premises, it is ORDERED that the said Motion be, and hereby is granted, and that Mr. Heggerty be, and he hereby is allowed ten (10) days within which to file an additional brief and a certified supplemental transcript of certain additional portions of the record and evidence in the above-entitled cause.

[Excerpt from Specifications Forming Part of Contract Between the Metropolitan Construction Co. and the Board of Public Works of the City and County of San Francisco, State of California (Annexed to Claim of Paul I. Welles).]

GENERAL PROVISIONS.

CITY ENGINEER: Whenever the words "City Engineer," or the personal pronoun used in place thereof, are used herein, they shall be and are mutually understood to refer to the City Engineer of the City and County of San Francisco, State of California, acting directly or through properly authorized agents, limited by the particular duties entrusted to them.

BOARD OF PUBLIC WORKS: Whenever the words "Board of Public Works," or the personal pronoun used in place thereof, are used herein, they

shall be and are mutually understood to refer to the Board of Public Works of the City and County of San Francisco, State of California, acting directly or through properly authorized agents limited to the particular duties entrusted to them.

INSPECTOR: Whenever the word "Inspector," or the personal pronoun used in place thereof, is used herein, it shall be and is mutually understood to refer to the inspector or inspectors of the Bureau of Engineering, of the Department of Public Works, of the City and County of San Francisco, State of California, limited by the particular duties entrusted to him or them.

CONTRACTOR: Whenever the word "Contractor," or the personal pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the party or parties contracting to perform the work to be done under this contract, or the legal representatives of such party or parties.

CITY: Whenever the word "City," or the pronoun used in place thereof is used herein, it shall be and is mutually understood to refer to the City and County of San Francisco, State of California. [1*]

WORK TO BE DONE TO THE SATISFACTION OF THE BOARD OF PUBLIC WORKS: The Contractor shall do all the work and furnish all the labor, materials, tools and appliances necessary or proper for performing and completing the work herein required in the manner and within the time herein specified, and the work must be done in a workman-

*Page-number appearing at foot of page of original certified Record.

like manner and under the direction and to the satisfaction of the Board of Public Works, and the materials must be in accordance with the specifications and to the satisfaction of the Board of Public Works.

INSPECTION: All work and materials, and the manufacture and preparation of such materials from the beginning of the construction until the final completion and acceptance of the herein proposed work, shall be subject to the inspection and rejection of the City Engineer at such times as may suit his convenience.

The City Engineer may assign such assistants as he may deem necessary to inspect the materials to be furnished and the work to be done under this contract, and to see that the same strictly correspond with the specifications herein set forth.

Any unfaithful or imperfect work or materials that may be discovered before the completion and acceptance of the herein proposed work shall be corrected immediately on the requisition of the City Engineer, notwithstanding that it may have been overlooked by the proper inspector, and it is hereby expressly agreed that the inspection of the City Engineer shall not relieve the Contractor of his liability to furnish material and workmanship in accordance with the specifications and to the satisfaction of the Board of Public Works.

The Contractor shall promptly obey and follow every order or direction which shall be given by the Board of Public Works in accordance with the terms of the contract. **[2]**

No inspector will be furnished to any gang of less than twelve (12) men, nor will any lines, levels or grades be furnished or given, when in the opinion of the Engineer, the number of men employed is too small to make proper progress.

Any work done during the absence of an Engineer or Inspector will not be estimated or paid for.

WORK TO BE DONE TO LINE AND GRADE: All work under these specifications shall be done to the lines and grades shown on the plans, points for which will be set by the City Engineer, and the work shall be prosecuted in such manner and from such points, at such times and with such forces as the City Engineer may determine from time to time during its progress.

ACCESS TO WORK: During the construction of the herein proposed work, the Board of Public Works and the agents and employees of the Board of Public Works may at any time and for any purpose enter upon the work or the shops where such work may be in preparation and the Contractor shall provide proper and safe facilities therefor. Other contractors performing work for the City under the Board of Public Works may also, for all purposes which may be required by their contracts, enter upon the work.

INSPECTOR NOT TO BE INTIMIDATED: The Inspectors at all times shall be free to perform their duties and any intimidation of any Inspector on the part of the Contractor or of the employees thereof, shall be sufficient reason, if the Board of Public Works shall so decide, to annul the contract.

INTERPRETATION OF SPECIFICATIONS: These specifications and plans are intended to be self-explanatory, but should any discrepancy appear or any misunderstanding arise as to the import of anything contained herein, the matter may be referred to the City Engineer, who shall decide the same in accordance with their true intent and meaning **[3]** as construed by him.

Any corrections of errors or omissions in these specifications or plans may be made by the City Engineer, when such correction is necessary for the proper fulfillment of their intention as construed by him.

The misplacement, addition or omission of any word, letter, figure or punctuation mark will in no way change the true spirit, intent or meaning of these specifications.

Wherever in the specifications, the words "as directed," "as required," "as permitted," or words of like effect are used, it shall be understood that the direction, requirement or permission of the Board of Public Works is intended. Similarly, the words "approved," "acceptable," "satisfactory," or words of like import, shall mean "approved by," or "acceptable to" or "satisfactory to" the Board of Public Works.

Whenever any article or any class of materials is specified by a trade name or by the name of any particular patentee, manufacturer or dealer, it shall be and is mutually understood to mean and specify the article or materials described, or any other equal thereto in quality, finish and durability, and equally

as serviceable for the purposes for which it is or they are intended, subject to the approval and acceptance of the Board of Public Works.

Any part of the work which is not mentioned in these specifications but is shown on the drawings, or any part not shown on the drawings but described in the specifications, or any part not shown on the drawings or described in the specifications, but which is reasonably implied by either or is necessary or usual in the construction of work of this class shall be furnished and installed by the Contractor as if fully described in the specifications and shown on the drawings.

LAWS AND REGULATIONS: In all operations connected with the work, the Charter and all ordinances of the City and County of San Francisco, and all laws of the United States and the State of California [4] which shall be or become applicable to, and control or limit in any way the actions of those engaged in any way as principal or agent, shall be respected and strictly complied with. The Contractor shall keep himself fully informed of all existing State and National laws and City ordinances and regulations in any manner affecting those engaged and employed in or on the work or in any way affecting the conduct of the work, and of all orders or decrees of bodies or officials having jurisdiction or authority over the same. He shall, himself, at all times, observe and comply with and cause any and all persons, firms or corporations employed by him or under him, to observe and comply with all such laws, ordinances and regulations, orders and decrees.

He shall protect and indemnify the City and County of San Francisco, the Board of Public Works and its or their officers, employees and agents against any claim or liability arising from or based on the violation of any such law, ordinance, regulation, order or decree, whether by himself or his employees.

LEGAL ADDRESS: The address given in the bid or proposal is hereby designated as the legal address of the Contractor, but such address may be changed at any time by notice in writing, delivered to the Board of Public Works.

The delivering to such legal address or the depositing in any postoffice in a postpaid wrapper, directed to the Contractor at the above address of any drawing, notice, letter or other communication, shall be deemed to be a legal and sufficient service thereof upon the Contractor.

CONTRACTOR TO MAINTAIN OFFICE: The Contractor shall maintain an office equipped with telephone instruments connected with local and long distance telephone, in the City and County of San Francisco, during the continuance of his contract and shall have in said office at all times between 8:30 A. M. and 5:00 P. M. (Sundays and legal [5] holidays excepted), a representative authorized to receive drawings, notices, letters, or other communications from the Board of Public Works and such drawings, notices, letters or other communications given to or received by such representatives, shall be deemed to have been given to and received by the Contractor.

The delivering at or mailing to the Contractor's

office in the City and County of San Francisco (written notice of which address shall be given to the Board of Public Works within ten days of the date of the contract) or the delivering to the Contractor in person or to his authorized representative in said City of San Francisco, of any drawing, notice, letter, or other communication shall also be deemed to be a legal and sufficient service thereof upon the Contractor.

COMMENCEMENT AND PROSECUTION OF WORK: The Contractor will be required to commence the work provided for in these specifications within fifteen (15) calendar days after the signing of the contract and to prosecute it diligently from day to day thereafter at such a rate as will enable him to complete the various parts of the work and the whole work within the time herein specified.

TESTS: All test specimens necessary for the determination of the character of any of the materials to be used or offered for use in the work herein proposed will be prepared and tested by the City Engineer.

Whenever required by the City Engineer, the Contractor shall furnish all tools, labor and materials necessary to make an examination of any work under these specifications that may be completed or in progress. Should such work be found defective, the cost of making such examinations and of reconstruction shall be defrayed by the Contractor. Should the work be found to be satisfactory, the examination will be paid for by the City in the manner herein prescribed for paying for extra work. **[6]**

SAMPLES: Samples of all materials used or offered for use in connection with this work and information as to their sources must be furnished to the Board of Public Works whenever required, and representatives of the Board of Public Works are to be given all desired facilities for the inspection of materials and processes used or to be used in connection with the work. Samples of the vitrified brick and steel for reinforcement must be submitted by the Contractor to the City Engineer for approval at least fifteen (15) days before it is proposed to use them in the work. Materials delivered on the work during its progress must be equal to the samples furnished. All materials will be inspected and any materials rejected must, on demand, be immediately removed from the work by the Contractor.

All samples shall be submitted in ample time to enable the City Engineer to make any tests or examinations necessary and the Contractor will be held responsible for any loss of time due to his neglect or failure to deliver the required samples to the City Engineer.

DEFECTIVE MATERIALS AND WORKMANSHIP: Materials, work or workmanship which in the opinion of the City Engineer do not conform to the specifications and drawings or are not equal to the samples submitted to and approved by the City Engineer shall be rejected.

If any materials used in the work or brought upon the ground, or selected for use in the same, shall be condemned by the City Engineer on account of bad or improper workmanship or as being unsuitable or

not in conformity with the specifications or not equal to the samples submitted, the Contractor shall forthwith remove from the work and its vicinity without delay all such rejected or condemned material of whatever kind, and upon his failure to do so within forty-eight (48) hours after having been so directed by the City Engineer, the condemned material may be removed by the Board of Public Works and the cost of said removal deducted from any money that is [7] then due or that may thereafter become due to the Contractor on account of or by virtue of his contract and no payments shall be made until such material, work or workmanship has been removed and proper materials and workmanship substituted therefor.

Materials or workmanship which, in the opinion of the City Engineer, do not comply with the requirements of the specifications or are not fully equal to the samples submitted to and approved by the City Engineer, may be rejected at any time during the progress of the work, notwithstanding any previous satisfactory testing or inspection on the part of the City Engineer.

CONTRACTOR TO SUPPLY SUFFICIENT AMOUNT OF MATERIAL: The Contractor shall at all times keep upon the premises a sufficient amount of materials and shall employ a sufficient number of workmen to complete the work herein specified within the time specified in the contract.

Should the Contractor at any time during the progress of the work refuse, neglect or be unable, in the judgment of the City Engineer, to supply a suf-

ficiency of materials or workmen to complete the work within the time specified in this contract, the City Engineer will notify the Board of Public Works that in his judgment, the Contractor is not providing sufficient materials or workmen to complete the work within the time specified in the contract. Upon receipt of such notice from the City Engineer, the Board of Public Works will notify the Contractor to furnish such workmen or materials as the City Engineer may consider necessary, and if the Contractor does not comply with said notice from the Board of Public Works within three (3) days of the date of service thereof, the Board of Public Works shall have the right to provide the materials and workmen to finish said work and the expense thereby incurred shall be deducted from any moneys due or which may thereafter become due under the contract. [8]

In order to meet the expenses so incurred, the Board of Public Works is hereby authorized by the Contractor to draw a warrant or warrants in the name of the Contractor and in favor of those persons, firms or corporations doing the work or providing the materials and labor, against the fund or appropriation set aside for the purposes of the contract, and when a warrant or warrants are so drawn they shall be conclusive upon the Contractor and shall be to all intents and purposes the same as if drawn by the Contractor in person, and the Auditor is hereby authorized by and on the part of the Contractor, to audit said demand or demands and the Treasurer is

hereby authorized by and on the part of the Contractor, to pay the same.

When any of said demands have been audited and paid, the amount of the same shall be deducted from the fund or appropriation set aside for the purposes of this contract and charged to the Contractor as if drawn by him.

The Board of Public Works shall have the option to terminate the contract in the manner hereinafter set forth, should the Contractor at any time during the progress of the work refuse, neglect, or be unable in their judgment, to supply a sufficiency of material or workmen to complete the work within the time specified in the contract.

PATENTS: All fees or claims for any patented invention, article or arrangement that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof shall be included in the price bid for doing the work herein proposed and the Contractor and his sureties shall protect and hold any and all departments of the City, together with all of its officers and employees, harmless against any and all demands made for such fees or claims against any and all suits and claims brought or made by the holder of any invention or patent, or growing out of any alleged infringement [9] of any invention or patent, and before the final payment is made on account of the contract, the Contractor shall furnish acceptable proof to the Board of Public Works of a proper release from all such fees or claims.

CITY TO HAVE FREE USE OF PATENTS: The Contractor shall grant the City the free use for all time of any patented invention that may be used upon or in any manner connected with the doing of the herein proposed work or any part thereof, for the purpose of replacing or repairing any part or parts of the herein proposed work.

SUB-CONTRACTS: The Contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the Contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sub-

let, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works. [10]

No sub-contract shall relieve the Contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works.

CONTRACTOR'S FOREMAN: The Contractor shall at all times during his absence be represented on the work by a foreman or foremen whom he has authorized and who is or are competent to receive and carry out any instructions that may be given to him or them by the Board of Public Works or its representatives, and the Contractor will be held liable for the faithful observance of any instructions which may be delivered to him or to his authorized representative or representatives on the work.

CONTRACTOR'S EMPLOYEES: The Contractor shall employ only competent and skillful men to do the work and whenever the City Engineer shall notify the Contractor in writing that any man on the work is, in his opinion, incompetent, unfaithful, disorderly or refuses to carry out the provisions of the contract or uses threatening or abusive language to any official or other person on the work representing the City and County of San Francisco, such man shall be immediately discharged from the work and shall not be employed again on it except with the consent of the City Engineer.

It is mutually understood and agreed that all the

laborers, skilled or unskilled (excepting confidential clerks, chief engineers and superintendents), who may be required in the construction of the work herein proposed, shall be citizens of the United States who are *bona fide* residents of the City and County of San Francisco.

USE OF STREETS: The Contractor shall not unnecessarily, in the judgment of the City Engineer, obstruct the streets or roadways by using them for storage of materials and supplies, and no materials or supplies [11] of any description shall be placed at any point along the line of the proposed sewers without first obtaining permission from the City Engineer.

NIGHT WORK: No night work requiring the presence of an engineer or inspector will be permitted, except in cases of emergency, and then only to such extent as is absolutely necessary and with the permission of the City Engineer, provided that this clause shall not operate in case of a gang organized for regular and continuous night work. In case any work is performed at night, the Contractor shall provide sufficient artificial light, in the judgment of the City Engineer, to properly prosecute the work.

SUNDAY WORK: No Sunday work will be permitted except in case of emergency, and then only with the consent of the City Engineer and to such an extent as he may judge to be necessary. The work to be done shall be under the general supervision of the City Engineer. At his discretion, he may from time to time direct the order in which and points at which the work will be prosecuted, and

may exercise such general control over the conduct of the work at any time or place as shall be required, in his opinion, to safeguard the interests of the City. The Contractor shall immediately comply with and follow any and all orders and instructions given by the Engineer in accordance with the terms of this contract, but nothing herein contained shall be taken to relieve the Contractor of any of his obligations or liabilities under this contract.

ACCESS TO WORK: The Contractor shall furnish proper facilities, by means of ladders or otherwise, to secure convenient access to all parts of the work, as may be required by the City Engineer.

SPIRITUOUS LIQUORS: The Contractor shall neither permit nor suffer the introduction or use of spirituous liquors upon or about the work **[12]** herein contemplated or upon any ground occupied by him in the prosecution of the herein required work.

SANITARY CONVENIENCES: Necessary conveniences will be constructed by the Contractor where needed for the use of laborers on the work, and their use shall be strictly enforced. The Contractor shall obey and enforce such sanitary regulations as may be prescribed by the Board of Health.

OFFICE AND TELEPHONE: The Contractor will construct on the work where directed by the City Engineer, a suitable office equipped with a table not less than three (3) feet wide by six (6) feet long; three chairs, a set of the plans and specifications. Telephone instruments connected with local and long distance telephones will be installed

therein and maintained at the expense of the Contractor.

Representatives of the Board of Public Works and the City Engineer, are to have the free use of this office and telephone.

CO-OPERATION: The Contractor shall co-operate with all other contractors who may be employed by the Board of Public Works on construction work in or on the streets in which the herein proposed work is to be performed, and he shall so conduct his operations as not to interfere with the work of other contractors or workmen employed by the Board of Public Works. He shall promptly make good, at his own expense, any injury or damage that may be sustained by the work of other contractors or employees of the Board of Public Works at his hands.

Any differences or conflicts which may arise between the Contractor and other contractors or the workmen of the Board of Public Works in regard to their work shall be adjusted and determined by the City Engineer. The Contractor shall suspend any part or all of the work herein specified or shall carry on the same in such a manner **[13]** as may be prescribed by the City Engineer, when the City Engineer considers such suspension or prosecution of the work necessary in order to facilitate the work of other contractors or workmen and no damage or claim by the Contractor will be allowed therefor other than an extension of the time specified in this contract for the completion of the work, for such a period of time as the City Engineer shall

certify in writing that the Contractor has been, in his opinion, delayed in the final completion of the work by reason of the work of other contractors or workmen.

The Contractor shall be held liable for any damage or delay to other contractors which may be caused by unnecessary delay or carelessness on his part.

PROTECTION OF THE WORK AND THE PUBLIC AGAINST DAMAGE: The Contractor shall protect his work and materials from damage due to the nature of the work, the action of the elements, the carelessness of other contractors, or from any other cause whatsoever, until the completion and acceptance of the work. Should any such damage occur, he shall repair it at his own expense, and leave the work to the satisfaction of the Board of Public Works in every particular. Neither the Board of Public Works nor any of its agents assumes any responsibility for collecting indemnity from the person or persons causing damage to the work of this Contractor.

The Contractor shall assume all responsibility for damage, arising from or in consequence of the execution of his contract, to adjoining work or property, the streets, sidewalks, mains, pipes, wires, poles or any other structures, interest or persons whatever, during the progress of the work contracted for, and shall furnish all guards, walks and lights and take all necessary precautions to prevent such damage.

REMOVAL OF RUBBISH: During the progress of the work the Contractor shall remove, upon de-

mand, such refuse material resulting from his [14] work or resulting from the work of other contractors as the City Engineer may direct. No additional allowance will be made for this work in the final estimate.

CONNECTIONS WITH PROPOSED SEWERS: The Board of Public Works shall have the right to discharge sewage into, connect any sewer or sewers with the sewer or sewers herein proposed, and no extra allowance will be made the Contractor in the final estimate on account thereof, and it is mutually agreed and understood that the making of such connection or connections and the discharge of sewage therefrom into the sewer or sewers herein proposed shall not be construed as an acceptance of any part of the work contracted for.

SEWERS TO BE CLEANED: During the progress of the work and until the entire completion and final acceptance thereof, the sewers, connections and their appurtenances are to be kept thoroughly clean throughout and left clean. If, in the final inspection of the work herein proposed, any obstruction or deposit is discovered in the sewers, appurtenances or any of their connections constructed under this contract, it shall, upon demand by the City Engineer, be removed at once by the Contractor.

CONTRACTOR TO INFORM HIMSELF CONCERNING UNUSUAL DIFFICULTIES: The Contractor is directed to inform himself, by carefully examining the location of the work and by such other means as he may prefer, as to the character and respective amounts of all the classes of material

that may be encountered in doing any excavating that may be necessary for the proper prosecution of the work herein contemplated and also of the amount of storm water, ground water and sewage he will be required to pump, bail or otherwise remove. He is also directed to make a special exhaustive inquiry at the office of any person or persons owning, controlling or operating any system or systems of railways, pipes, conduits, wires or any other structures that may be **[15]** on, over or under the surface of the street or streets along which the proposed work is to be done, and to determine, to his satisfaction, the character, size, location and length of such system or systems of railways, pipes, conduits, wires, structures, etc., and the extent that they will increase the expense of performing the work herein proposed, and to inspect the public records of the various City Departments having cognizance or control of systems of railways, pipes, conduits, sewers, wires or any other structure or structures that may be on, over or under the surface of the streets, and he is hereby directed to include in the unit price that he bids for the various portions of the work herein proposed, any and all expense he may be put to because of the existence and handling of any difficult or unusual classes of material, unusual amounts of storm water, ground water, and sewage in performing any part of the work herein contemplated and because of any additional work or delay that may be caused directly or indirectly by any or all of the hereinbefore mentioned or any other obstructions, and it is clearly understood that the

Board of Public Works does not insure the accuracy of any of the before mentioned records, reports or information and the Contractor agrees not to make any claim against the City and County of San Francisco or any of its officials or employees for any damage, extra work or expense caused by unforeseen difficulties of construction or occasioned by his relying upon any such records, reports or information, either as a whole or in part, furnished by any City Department, official or employee, or by any Company.

CHANGES AND EXTRAS: The Contractor shall do any and all extra work necessary for the proper construction or completion of the whole work herein contemplated that may be ordered by the Board of Public Works, in accordance with the provisions of Resolution No. 1246 (Second Series), of the Board of Public Works, and as full compensation for such extra work the Contractor shall accept an amount **[16]** equal to the actual cost of the work estimated by the Board of Public Works plus twenty (20) per cent for profit. In estimating the cost for extra work no allowance will be made for the use of tools, plant, or for general superintendence.

ALTERATIONS: The Board of Public Works, by resolution, may order alterations in the amount or dimensions of the work herein contemplated or any part thereof, either before or after the commencement of construction.

If said alterations increase the amount of concrete, reinforcing steel or excavation required to complete the work, the Contractor shall accept as full com-

pensation for such increase in material and labor, the following amounts:

For each such cubic foot of concrete completed in place.....$0.25

For each such pound of reinforcing steel in place $0.04

For each such cubic yard of excavation, including such additional or extra shoring, bracing, pumping and draining that said excavation may necessitate.....$0.75

In case said changes decrease the amount of concrete, reinforcing steel or excavation required by the plans, the price bid by the Contractor for doing the work herein required shall be decreased in the final settlement by the following amounts:

For each cubic foot of concrete less than required by the plans.....$0.25

For each pound of reinforcing steel less than required by the plans.....$0.04

For each cubic yard of excavation less than required by the plans.....$0.75

If such alterations diminish the quantity of work or materials of a class for which there is no price established in the contract, there shall be deducted from the contract price an amount equal to the actual cost of the work not performed, as estimated by the City Engineer, plus fifteen (15) per cent of said actual cost. In estimating the cost of work not performed no allowance will be made for the use [17] of tools, plants, or for general superintendence and the Contractor shall make no claim for damages because of anticipated profits on any work

that may be dispensed with.

In case such alterations increase the amount of work or materials of a class for which there is no price established in the contract, the Contractor shall accept as full compensation for such additional work an amount equal to the actual cost of the additional work as estimated by the City Engineer, plus fifteen (15) per cent for profit. In estimating the cost of additional work, the City Engineer will make no allowance for the use of tools, plants or for general superintendence.

TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the Contractor shall be deemed a breach of the contract.

Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due

to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract.

MEASUREMENTS, ETC.: In estimating and allowing quantities, all lengths will be based on horizontal measurements. **[18]**

Main sewers will be measured along their center lines, from center to center of manholes.

Side sewers and culvert pipes will be measured from the bell of the slant of the T branch.

No extra allowance will be made for slants, future pipe sewer connections or culvert connections in the masonry sewers.

No extra allowance will be made for closing openings in existing brick sewers with brick work.

All cut-offs from piles are to be the property of the Contractor and no allowance will be made for the portion of the pile above the cut-off.

PRICE TO COVER: In naming a price for performing the work of constructing any of the herein described sewers and structures, bidders are directed to include in said price the cost of completing the sewer or structure, together with the cost of removing the existing sewers from the streets wherein the new work is proposed, or opening and filling them with sand and removing and disposing of their contents, as ordered by the Board of Public Works, the cost of excavating, lagging or shoring and bracing, draining, refilling, disposing of surplus material from and removing and restoring the pavement over

such excavations as are necessary and maintaining such property of public service corporations and underground structures as may be encountered in the performance of said work, as no additional allowance will be made in the final estimate for performing any of the above named work.

HOURS OF LABOR: In the performance of the herein proposed work, eight (8) hours shall be the maximum hours of labor on any calendar day.

AMOUNT OF WORK ESTIMATED: The amount of each class of work has been preliminarily estimated as follows, and this estimate will be used as a basis for comparing bids. The Board of Public Works does not expressly **[19]** or by implication agree that the actual amount of work will correspond to said estimate, but reserves the right to increase or decrease the amount of any class or portion of the work as is in its opinion to the interest of the City and County of San Francisco.

BASIS OF FINAL PAYMENT: Final payment will be made on the basis of the amount of each class of work actually done in accordance with the specifications and to the satisfaction of the Board of Public Works. **[20]**

[Certificate of Referee in Bankruptcy to Part of Specifications Called "General Provisions."]

I, Armand B. Kreft, Referee in Bankruptcy, to whom the Matter of Metropolis Construction Co., Bankruptcy, #6827, in the District Court of the United States for the Northern District of California, was referred, do hereby certify the foregoing to be a full, true and correct copy of that part of

the specifications called "General Provisions," which are annexed to and made part of the contract between the Metropolis Construction Co., and the Board of Public Works of the City and County of San Francisco, State of California, dated July 22, 1910, and which are annexed to the claim of Paul I. Welles, filed in my office in said District Court of the United States, in the Matter of Metropolis Construction Company, a Corporation, Bankruptcy, No. 6827, now remaining on file and of record in my office.

ATTEST my hand, this 28th day of April, A. D. 1914.

ARMAND B. KREFT,
Referee in Bankruptcy.

[Certificate of Clerk U. S. District Court to Copy of Certified Copy of That Part of Specifications Called "General Provisions," etc.]

I, W. B. Maling, Clerk of the District Court of the United States for the Northern District of California, hereby certify the foregoing and hereunto annexed twenty pages, numbered from 1 to 20, inclusive, contain a full, true and correct copy of a certified copy made by A. B. Kreft, Referee in Bankruptcy, of that part of the "Specifications" called "General Provisions," annexed to the contract between the Metropolis Construction Co. and the Board of Public Works of the City and County of San Francisco, dated July 22, 1910, and which specifications are annexed to the claim of Paul I. Welles, in the Matter of the Metropolis Construction Co.,

No. 6827, in Bankruptcy, as the same now appears on file and of record in my office, in case No. 15,148, Paul I. Welles, Complainant, vs. John Daniel, Trustee of the Estate of Metropolis Construction Co., a Corp., Bankrupt, Portuguese-American Bank of San Francisco, a Corp., and Thomas F. Boyle, Defendants.

I further certify that said Armand B. Kreft, Esq., is a duly appointed Referee in Bankruptcy of this court, and that the bankruptcy matter of the Metropolis Construction Co. herein referred to was duly referred to and is now pending before said Referee.

I further certify that the costs of preparing and certifying the foregoing is the sum of Ten Dollars ($10), and that the same has been paid to me by the attorney for the Portuguese-American Bank of San Francisco, a corporation.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of the said District Court this 8th day of May, A. D. 1914.

[Seal] W. B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

[Endorsed]: No. 2273. United States Circuit Court of Appeals for the Ninth Circuit. Paul I. Welles and John Daniel, Trustee of Metropolis Construction Company, a Corporation, Bankrupt, Appellants, vs. Portuguese-American Bank of San Francisco, a Corporation, Appellee. Supplemental

Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, First Division.

Received and filed May 8, 1914.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

Contents.

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES, and JOHN DANIEL, Trustee of Metropolis Construction Company (a corporation), Bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),
Appellee.

BRIEF FOR APPELLANTS.

Statement of the Case.

(Numbers in parenthesis refer to pages of the transcript.)

(The italics in this brief are by counsel for appellants.)

In December, 1910, the Metropolis Construction Company, a corporation, made a claim upon the City and County of San Francisco for the amount of a payment which it claimed to be due under the terms of its contract with the city for the construction of sewerage at Fourth and Kentucky streets, $6,830.85. This claim or demand was ap-

proved by the board of public works. On the day of its approval by the board of public works, the company presented a certified copy of the resolution approving the claim (together with two others, all amounting to about $38,000.00), to the Portuguese-American Bank of San Francisco, together with a paper addressed to the city auditor, notifying him that the bank was authorized and empowered to draw the warrants for the amounts (pp. 138 and 139). On that day the bank loaned the construction company thirty thousand ($30,000) dollars and followed it the succeeding day with an additional five thousand ($5000) dollar loan. No notice was given the city treasurer, or board of public works, or any other official of the City and County of San Francisco, except the auditor, either by or on behalf of the bank or the construction company until after December 15, 1910, namely, December 17, 1910 (p. 143); nor were the claims approved by the board of supervisors or the mayor of the city until after that date, namely, January 3 and 4, 1911 (p. 145 and 216). The demands themselves did not reach the auditor's office until January 5, 1911 (p. 219). *No consent whatever* to any assignment was obtained nor given as required by the contract (pp. 137 and 146).

The procedure is that

> "all demands of this kind, after being approved by the board of public works, the board of supervisors, and the mayor, are received by the auditor and by him delivered to the person shown to be entitled thereto; who takes the

> same to the city treasury, there receiving the cash and leaving the demand, after signing his name in the back thereof under the words 'Received payment', printed upon the demand" (p. 144).

While the bank claims it had authority to physically receive the demands for the fourth progress payment from the auditor, *if and when* they should come to the auditor's office and have received the approval of the auditor, still it is admitted that these demands, *if and when* they should be so received, *would remain in the name of and payable to the construction company,* the alleged assignor, and *would require the signature* of the *construction company,* the alleged assignor (under the words "Received payment" printed upon the demand).

The referee finds it a fair inference that the individuals who were parties to the loan at the bank intended (in their minds) that some officer of the construction company should do this. But the construction company, nor any of its officers, did not give or make any promise, either orally or in writing, to do this, and consequently the bank had none—no authority whatever to demand or receive the cash from the city treasurer, either in its own name or in the name of the construction company. And this was the legal situation of the parties (at least so far as these appellants are concerned), regardless of what *inexpressed intention they* might have had or that might reasonably or unreasonably be inferred.

In other words, the bank was in such a position that it would have had to demand and necessarily receive the intervening act (willingly or unwillingly) of the officers of the construction company before it could demand the cash from the city treasurer.

The assignee could not get the money without the further intervention of the assignor, whose consent to intervene would have to be obtained willingly, or, if not, then the bank might *try* some other way, a lawsuit, perhaps. But such intervention, mediately or immediately, of the assignor, the alleged assignee would have to have in the situation as created by the parties themselves, or it could never get the money from the fund holder, the city treasurer.

The charter of the City and County of San Francisco then in force, provided (Art. 11, Chap. 1, Sec. 19) that all demands payable out of the treasury must be first approved by the board of supervisors *before they can be approved by the auditor or paid by the treasurer;* that all demands for more than two hundred dollars shall be presented to the mayor for his approval, and all resolutions directing the payment of money, other than salaries or wages, when the amount exceeds five hundred dollars, *shall be published for five successive* days, Sundays and legal holidays excepted, in the official newspaper (p. 21).

The contract of the construction company with the city provided that it could not, *either legally or equitably,* assign any moneys payable thereunder

or its claim thereto without the consent of the board of public works (p. 137). This consent the construction company and the bank neglected to obtain, and it was never given by the board of public works as required by the contract (pp. 137 and 146)!

The Metropolis Construction Company did not execute any paper which in terms purported to assign either its contract or any payment thereunder to the bank, but only a letter notifying the auditor that the bank was thereby authorized and empowered to draw the warrants *in favor of the construction company* (p. 139).

The construction company's claim against the city was made *in its own name* and remained that way until the warrants were issued in January, 1911; and, when these warrants were issued, they were also issued as *payable to the construction company* (p. 147). Neither the demands for the fourth progress payments nor the warrants therefor are in the name of the bank, nor does it hold any authorization or power to endorse the construction company's name or to receipt for the payments, so that the transaction, in order to inure to the benefit of the bank, as a matter of law, *required the signature of the construction company* by some properly authorized officer.

And that was the way the cashier of the bank understood it. He testified (p. 249): "I had no other paper on this particular loan from the Metropolis Construction Company, outside of the note

and this assignment," referring to the resolutions of the board of public works and the notice to the auditor as an "assignment."

And again (p. 253), the cashier testifies (referring to a similar paper, used once before on an occasion when no lien holders objected): "The paper itself, the demands, were made out in the name of the Metropolis Construction Company," saying, in this connection, moreover, that this paper gave him authority to receive the *money, which is the very thing that it did not do*—the very authority the bank *never had.*

On December tenth (p. 149), and fifteenth (p. 150), 1910, Paul I. Welles, appellant, who was a sub-contractor of the Metropolis Construction Company, gave notices to withhold under Section 1184 of the Code of Civil Procedure, which were forthwith duly served by him on the board of supervisors, the mayor and the city auditor and treasurer. (Section 1184 of the Code of Civil Procedure of the State of California, as it stood at the time these notices were served, is printed in the argument, later on in this brief.)

Immediately after this, December seventeenth and nineteenth (p. 143), the bank gave notice to the board of works, the board of supervisors and city auditor, of its claimed assignment; and, on January 4, 1911, to the city treasurer. In the meantime, however, and on December 19, 1910, a petition in bankruptcy against the construction company was filed in the United States District

Court, and the construction company was thereafter duly adjudicated a bankrupt.

The appellants are the sub-contractor, Paul I. Welles and the trustee of the bankrupt's estate, which will have to regard Welles as a general creditor unless he be successful here; but would not have so to regard the bank, which has neglected to file any claim in bankruptcy.

The proceeding is a controversy arising out of the settlement of a bankrupt estate.

On October 14, 1911 (p. 92), a report was filed by the referee. The referee was ordered (p. 92) "to hear the testimony and find the facts upon all issues made by the pleadings," but his report shows that (p. 93) the pleadings did not include an *answer* by the bank, at that time, and the hearing was really upon the order to show cause and returns thereto.

In this report of October 14, 1911, the referee made findings of fact.

While the cause was subsequently sent back to the referee twice and that officer sent in a report, March 8, 1912 (p. 120), asking for further instructions and a final report, July 16, 1912 (p. 132), it is a fact that the facts found in the report filed October 14, 1911, *have never been subsequently altered, enlarged, diminished or amended.*

This report was confirmed without objection. But, it being only on an *order to show cause,* the opinion and order thereon made December 12, 1911

(p. 114), were not strictly followed and the cause was sent back to the referee by order of December 26, 1911 (p. 119), to find the facts upon the issues arising upon the pleadings, *which were then complete.*

The referee, however, seemed to consider the former findings of fact, as confirmed, *res adjudicata,* and so reported to the court on March 28, 1912 (p. 121), asking for "instructions as to further proceedings, if any" (p. 124).

The court did not consider the former findings (on the order to show cause) *res adjudicata,* and ordered the referee to *ascertain* and report "the facts" without reference to them (p. 128).

The final report of the referee was pursuant to this order and was filed July 16, 1912 (p. 132). In this final report the *facts* found *are the same* as the *facts* found in the report of October 14, 1911, upon which the court concluded a decree should issue for the complainant as prayed, *and so ordered.*

The referee says no additional evidence was introduced on this third and last reference (p. 133), but "this cause was submitted to the referee upon the record as made upon the order to show cause and upon the previous reference * * * dated December 26, 1912" (the second reference).

Looking at the report made on the second reference we find that while some additional evidence was taken (by stipulation, no witnesses being sworn pp. 263-272) the referee finds that the addi-

tional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the court in its said memorandum of opinion" (p. 124) and "finds the facts upon the issues arising upon the pleadings to be as reported by him in his former report, together with the additional facts set out in this report" (p. 123)—which are the additional facts found by him not to raise any new question nor affect the rights of the parties.

So when the cause was submitted finally to the court (Dietrich, J.) the *findings of fact* were *identically* those facts found in the referee's report of October 14, 1911, confirmed by the court (DeHaven, J.) December 12, 1911, wherein a decree was ordered for complainant on December 12, 1911 (p. 114).

QUESTIONS INVOLVED.

First Question. Did the court err in making a decree herein that the defendant, Portuguese Bank of San Francisco, has a good and valid assignment of the fourth progress payment on the Fourth and Kentucky street sewer contract, and is the owner thereof entitled to have and possess the same and the money due and payable under the demand therefor; and in not holding that said fourth progressive payment was not assigned, for the reason that the alleged assignment is void because of failure to obtain consent as required by the contract?

SECOND QUESTION. Did the transaction between the construction company and the bank, in December, 1910, constitute an assignment by the construction company to the bank of the fourth progress payment on the Fourth and Kentucky street sewer contract?

THIRD QUESTION. If so, was the fourth progress payment *matured* on December 15, 1910, so that the construction company could demand immediate payment; and, *if not,* did the appellant Welles obtain a prior right thereto by his notices to withhold under Section 1184 of the Code of Civil Procedure, served December 10 and 15, 1910?

FOURTH QUESTION. Did the opinion and order of the court that a decree be made in favor of complainant as prayed, made December 12, 1911, upon the facts found by the referee in his report filed October 14, 1911, become the *law of the case* and fix the right of the complainant to the relief so ordered, in view of the fact that the record submitted on final hearing discloses that the facts as they are stated in the referee's final report filed July 16, 1912, remain in all respects as they are stated in his former report of October 14, 1911, upon which said decision was made and decree for complainant ordered?

APPELLANTS' POSITION.

POINT. 1. Appellants' position is that the court erred in giving and making a decree herein, that

the defendant, Portuguese-American Bank, has a good and valid assignment of the fourth progress payment and is entitled to have possession of the money due and payable under the contract, and in not holding that the payment in question was not assigned to the bank for the reason that the contract, by its very terms, provides that *the contractor shall not, either legally or equitably, assign any moneys payable under this contract, or his claim thereto, unless with the consent of the board of public works* (p. 137), and that the alleged assignment is, therefore, legally void.

POINT 2. Appellants contend that the transaction between the respondent bank and the construction company did not amount to an assignment.

POINT 3. Appellants contend that, even if it did amount to an assignment, the fourth progress payment was not *matured* at the time so as to prevent the sub-contractor's lien under Section 1184 from attaching as a prior right to the fund; and

POINT 4. Appellants contend, upon the coming in of the report of the referee on the 16th day of July, 1912, it *then* appearing that no further evidence had been offered, *and no new findings of fact made,* the former adjudication of December 12, 1911, upon findings thus remaining undisturbed (that complainant Welles was entitled to a decree in his favor, as prayed) appeared conclusively to be *the law of the case,* from which neither the referee nor the trial court had any right to depart;

that an adjudication, solemnly declared by one judge on the facts then before him in a case ought not to be subject to alteration (the facts remaining the same) by every new judge who subsequently may sit in the cause, but only upon a different state of facts subsequently appearing, otherwise a litigant might be buffeted by judgments both for and against him *upon the same facts in the same court and cause*—INTOLERABLE AS A THEORY OR CONDITION.

RESPONDENT'S POSITION.

Respondent's position is simply based on the reasoning of the referee's opinion, to the effect that the transaction between the construction company and the bank amounted to a legal assignment, that the assignment was not void for failure to obtain consent, that provision in the contract being merely for the protection of the city, and that the payment in question was matured at the time so as to give the assignments priority over any notice to withhold made subsequently and before the demands were approved by the board of supervisors or the mayor.

As to the fourth point, neither the respondent, nor the lower court in its opinion, has offered any reason or authority in refutation.

Concerning the opinion of the learned judge of the district court, it is to be observed that he erroneously bases his opinion upon the fact that

the city authorities were never formally or specifically advised of the rights of the plaintiff until Welles gave his notice to withhold (p. 185). The finding of the referee upon this point is (p. 137) "that Mr. Welles acted as sub-contractor *with the knowledge of the board of public works* and of its inspector of the job *all the time,* openly and without any concealment; that he had his name in the telephone book and he had his sign 'Paul I. Welles' as sub-contractor on the job." Is Mr. Welles to be *penalized* for not giving a *formal* notice, then, of something the board actually *knew* "all the time"? The conclusion of the court that he should be is not a correct legal or equitable conclusion; nor is any laches imputable to Welles on that account.

The question of laches dwelt upon by the court in its opinion was neither raised nor discussed by either party in the court below. If the court had gone sufficiently into the record, he would have discovered that the respondent could not have raised such a question, for the reason that the claim of Mr. Welles had been duly filed and approved in bankruptcy as a secured claim against the bankrupt's estate that this was a final judgment as to its merits and validity (the time to object having expired), and that, while the respondent bank might have been in the position before adjudication to urge laches or neglect against Welles as the reason why the claim should not be approved, if it had chosen to appear in the bankruptcy proceedings, it was in no such position at any time thereafter, and

certainly not at the time the question was submitted to the court below for its decision.

Also that by reason of the fact (p. 137) that Welles acted as sub-contractor *all the time,* with the knowledge of the board of public works and its inspector on the job, that board would be estopped, as between it and Welles, from claiming that it had not given its consent.

This is a cause which had been before the court two or three times and had been fully argued and elaborately briefed before Judge DeHaven and which it is respectfully submitted the judge who finally approved the referee's legal conclusions had not the opportunity fully to become acquainted with.

The notices to withhold were either within time or they were not within time under Section 1184, C. C. P. If they were within time no laches is imputable to Welles.

The argument with reference to laches also is met by the answer that if the bank had inquired at the board of works they would have found that Welles was a sub-contractor because he was such *with the knowledge of that board and its inspector,* and had his sign on the works (p. 138). But the bank made no inquiry whatever at the board of works.

The other objection is met by the answer that Welles had an unquestioned right to give the notices any time before the *last* payment was *matured;* and that it was the only sane and safe course for him,

as a business man, to pursue; because, a notice given by him at the beginning of work would naturally arouse anger and condemnation on the part of the contractor. Appellants venture the belief that the court will agree with them that a sub-contractor pursuing a course of filing stop notices with the owner as soon as he received a sub-contract, would become unpopular and lose business on that ground alone. How long, we respectfully ask, would a sub-contractor succeed in doing business were he to serve a stop notice on the owner as soon as he entered upon the performance of his sub-contract? What sort of business confidence would such a procedure, if generally adopted, manifest on the part of sub-contractors? How long could contractors do business with such people? How long would they continue to do so? Manifestly, the better construction of the statute is that no laches is to be imputed to anyone who does not file a stop notice at the beginning of his employment as a sub-contractor or material man, provided he does so within any time before payment is matured or immediately payable. Such a "cash in advance", "stand and deliver" method of transacting business might be strictly legal, but it would not be tolerated in any American community. Mr. Welles did not obtain *formal* consent to the sub-letting of the contract to him, but this was with the full knowledge of the board of public works (p. 137), who would be presumed to have consented under the circumstances; besides which, before this suit was brought Mr. Welles'

secured claim in the bankruptcy proceedings had been filed and allowed (p. 150).

SPECIFICATION OF ERRORS.

1. The errors upon which appellants rely in praying this court for a reversal of a decree of the lower court overruling appellants' exceptions and confirming the referee's report and which are more particularly stated in their respective assignments of errors (pp. 192-205) may be classified under the following larger headings:

I.

The court decided (p. 152) that the alleged assignment in favor of the bank was not void because of failure to obtain consent; that such a provision is for the protection of the city and can only be invoked by the city, and that the bank was entitled to have the money as against the rights of the trustee in bankruptcy.

Appellants contend that the court erred in not holding that the payment in dispute was not assigned and in holding the bank to be entitled to the money, and that the court should have held the trustee in bankruptcy and, also, Welles to have the better right thereto, than the bank; for the reason that the alleged assignment is legally void for failure to obtain consent; and in overruling appellants' exceptions, in that behalf, to the referee's report (Assignments Nos. 1, 6, 10, 16, 17, 19, 23, 24; Excep-

tions Nos. 6, 7, 8 and 11, pp. 175-177; Exceptions Nos. 1, 2 and 3, pp. 180 and 181).

II.

The court decided that an assignment arose in favor of the bank, December 5, 1910.

Appellants contend that the evidence is insufficient to sustain the finding of the existence of such an assignment and that as a matter of law, no such assignment could be held to exist; that the court therein erred, and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 4, 6, 7, 8, 12, 13, 14, 15 and 17; Exceptions Nos. 5, 8, 9, 13 and 14, pp. 176, 178 and 179; Exceptions Nos. 1 and 3, pp. 180 and 181).

III.

The court decided that the fourth progressive payment in controversy became due and was matured on December 5, 1910 (p. 159) and that the notices to withhold made by Welles on December tenth and fifteenth, 1910, were subject to a prior right acquired by the bank on the fifth day of December, 1910, by its alleged assignment.

Appellants contend that under Section 1184 of the Code of Civil Procedure, as construed by the Supreme Court of California in the case of Newport & Co. v. Drew, Mr. Welles obtained a prior right; that the court therein erred and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 2, 3, 5, 9, 10, 16 and

18; Exceptions Nos. 2, 3, 4, 5, 10, pp. 173, 174 and 177; Exceptions Nos. 1 and 4, pp. 180 and 181).

IV.

The court decided that the findings and report of said special master and examiner, and the order of the court confirming the same of December twelfth, 1911, and ordering a decree for the complainant, Welles, as prayed, did not become conclusive as the law of the case upon it subsequently appearing that no new facts were found.

Appellants contend that the opinion and order of December 12, 1911, is conclusive as the law of the case, and fixes the right of complainant Welles to have entered a decree in his favor in the absence of new or changed facts or findings of fact in the referee's final report; that the court therein erred, and in overruling appellants' exceptions in that behalf to the referee's report (Assignments Nos. 1, 11, 19, 24 and 25; Exception No. 12, p. 177 and No. 1, p. 180).

Discussion.

ON BEHALF OF APPELLANTS.

For convenience appellants wish first to discuss their point numbered four.

In this case, on December 12, 1911, the facts had been found on hearing before the referee of an order to show cause. The report of the referee had been filed October 14, 1911 (p. 92).

This report was confirmed *without objection* and the court (December 12, 1911) *concluded* complainant entitled to a decree and so ordered (p. 114). There was a memorandum opinion and a minute order to this effect.

On December 18, 1911, however, the court (p. 119), the first hearing having been upon an order to show cause, only, ordered the cause back to the referee for *final hearing.*

On March 8, 1912, the referee made his report showing the *whole record* of the former hearing on the order to show cause to have been admitted (pp. 122 and 263) in addition to certain stipulations and documentary evidence (p. 122). Then the referee merely re-affirmed the findings of fact in his former report in addition to such admissions (p. 123) and informs the court that "the additional facts adduced upon this hearing do not raise any new question which would affect the rights of the parties as determined by the court in its opinion of December 12, 1911 (p. 124), and treats that opinion and order as *res adjudicata* as to the facts found, and asks for instructions (p. 124).

This opinion of the referee was evidently based upon the rule that:

> "When the case is heard on facts found by a referee to whose findings of fact there is no objection filed, *the findings of fact are conclusive* (Equity Rule 83); and, when the case is decided on such facts, then it is a final disposition of the cause."
>
> In re Royal, 7 A. B. R. 638 (N. C. Jan. 27, 1906).

Appellants here, however, do not find it necessary to take the view suggested by the referee that these findings of fact were *res adjudicata,* but, on the contrary, regard the action of Judge DeHaven in sending the cause back to the referee with instructions to *ascertain the facts* and report his conclusions regardless of the former report, as correct, because the first hearing had been only upon an order to show cause and, therefore, it was right to give the bank an opportunity to bring in any new or additional evidence it might have on a final hearing to aid its claim of an "assignment", for the reason that the findings and conclusions upon the order to show cause *might* be changed upon final hearing, *if the facts then should appear to be different.* The bank excepted to this second report on the ground, among others, that the former confirmation was not *res adjudicata* as to the facts (p. 126) and asked that the court re-refer the cause to the referee to report his findings and conclusions (p. 127). Thereupon the court, on April 15, 1912, evidently considering the bank should have an opportunity to produce further proof on *final* hearing, if it had any, returned the matter to the referee and instructed him to "*ascertain* and report" the facts and his conclusions of law therefrom without reference to the former confirmation (p. 128); thus, in effect holding that confirmation not to be *res adjudicata* as to the facts found, but expressly giving either party a *chance* to introduce *further proof on final hearing.*

This, however, the bank did not do. Neither did any party to the action do so. *No additional evidence whatever was taken* (p. 133), but the final report of the referee was made upon the record as it stood *prior to the reference of April 15, 1912* (p. 132), namely, according to the findings of October 14, 1911, upon which the decision and order of December 12, 1911, had been made.

Admitting that the bank was right in its position that the decision of December 12, 1911, was not *res adjudicata* and that it should have been given an opportunity to produce further proof, the appellants' contention is that the opinion of December 12th appeared as the *fixed law of the case* when it subsequently appeared, as it did appear, that the parties did not offer any new or additional facts in evidence when the matter was returned to the referee, but submitted the cause on the record as it then stood.

The finding of the referee on this point will be taken as conclusive. It is (p. 133): "No additional evidence being introduced under the reference of April 15, 1912", etc. The report of the referee, filed July 16, 1912 (p. 132), where this finding is made, states in addition that the cause was submitted to him *"upon the record as made, upon the order to show cause"* (namely, October 14, 1911) "and upon the *previous reference* to the referee to make findings of fact."

In other words, the referee acting upon a record and upon findings of fact as it stood on October

14, 1911, as confirmed by the decision of December 12, 1911, when the court ordered the decree on said facts as prayed by the complainant, merely re-stated the *same facts* in his final report and took the occasion of stating his opinion of the law contrary to the previous opinion and adjudication by the court, on those very same findings of fact!

The question whether the findings of fact confirmed by the opinion and order of December 12, 1911, became *res adjudicata*, or not does not enter into this discussion. The issue is of greater import than that, because unless the law of the case, apparent from an opinion and solemn order of the court made and filed at one stage of the case, be stable, unchangeable, upon the facts as they appeared when the order was made, *in the absence of additional findings of fact,* or any material change in the record, the cause of civil justice rests upon no sure foundation, but may truly be said to be shifting as the sands of the sea, and *without order!* in the absence of which there can really be no law!

The report, as confirmed by the order of December 12, 1911, was, however, *the law of the case at that time* ON THOSE FACTS. And when, on the coming in of the *final* report, it appeared that these facts, so confirmed, remained absolutely unchanged, then, also, the decision of the court December 12, 1911, that *on those facts* the complainant was entitled to the relief demanded, and disbursements, remained firmly the law of the case and fixed the right of the complainant to a decree.

It was conclusive, under those circumstances, and the court erred in not so holding.

The ruling thus made became *the law of the case upon those facts,* because it was made after a full hearing of the facts and upon reported findings of the same which were not excepted to and had been confirmed.

It is proper and just that a solemn ruling made under such circumstances should be final in the absence of any change in the findings of fact or status of the parties.

Van Fleet, District Judge. announced the rule in a late case (July 25, 1911) in the Circuit Court for the Northern District of California, as follows:

> "A careful review of the records submitted on final hearing discloses that the facts as they are stated are in all material respects fully sustained by the evidence taken before the master; and under those circumstances, it must be held, as contended by complainants, that the principles announced in that opinion as the basis of the order granting the preliminary injunction, *become the law of the case* in this court, *and fix* the right of the complainants to have the injunction made perpetual. *The ruling was not, as claimed by respondents, a purely tentative one,* like an ex parte order granting a temporary restraining order. *It was a ruling made in response to an order to show cause, and after a full hearing of the prima facie case made by* the sworn bill and the affidavits of both parties; and, *the showing then made* being fully *sustained* by the evidence on the *final* hearing, *the ruling becomes conclu-*

sive, excepting only on review by an appellate court.''

Loewe et al. v. Cal. St. Fed. of Labor (No. 13764), 189 Fed. Rep. 714-715.

The principle announced by Judge Van Fleet in the Loewe case ought certainly to be carefully enforced. And on that appellants rest this branch of their case.

ASSIGNMENT.

Concerning the matter of the assignment (appellants' first point) the appellants contend that the fourth progress payment was not assigned as a matter of law; that, therefore, the court erred in holding the bank to be entitled to the money and that the court should have held the trustee in bankruptcy and, also, appellant Welles to have the better right thereto for the reason that the alleged assignment is void because of failure to obtain consent as required by the contract.

The finding of the referee (p. 152) adopted by the court (p. 183) is:

> "The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city."

The provision of the contract as found by the referee (p. 137) is that the contractor

> *"shall not, either legally or equitably assign any of the moneys payable under this contract, or his claim thereto, unless with the like consent of the board of public works"* (p. 137).

and that,

> *"the board of public works of the city has never given consent to any assignment to the bank of said contract or of the fourth progress payment upon said contract or any part thereof"* (p. 146).

The assignment was made to the bank, not only without the consent, but without knowledge of the party (the board of public works) whose consent was necessary.

It is not intended that the sections of the Civil Code doing away with whatever restrictions formerly existed upon the power of parties to assign ordinary contracts, should render null any agreement that the parties might make on the subject of assignment; and it may be made non-assignable, either by express language or by construction.

LaRue v. Groezinger, 84 Cal. 281, 283-286.

Inasmuch as this contract contained an express provision prohibiting the assignment of any money or any claim thereto unless with consent of the board of public works, the assignment claimed by the Portuguese-American Bank is absolutely null and void for the reason that no such consent was had or obtained.

"There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the Statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy." * * *

"The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company."

Butler v. San Francisco Gas & Electric Co., May 29, 1913, Civil No. 1053, Vol. 16, C. A. D. page 946, 949, 953; citing,

Burck v. Taylor, 152 U. S. 635;

LaRue v. Groezinger, 84 Cal. 281, and other cases there cited.

In the Burck case the contract contains a clause prohibiting any assignment without the consent of the state, and in discussing its effect the Supreme Court of the United States, through Mr. Justice Brewer, declared that it was a stipulation which was one of the terms of the contract and binding upon the contractor, *and equally binding upon all who dealt with him.* The contractor's assignee acquired no rights by an assignment.

"No right to recover anything from the state."

That the parties to a contract may in terms prohibit its assignment *so that an assignee cannot*

succeed to any rights in the contract by virtue of the assignment thereof to him is held in the case of

> Mueller v. Northwestern University (Feb. 1902), 195 Ill. Rep. 236; 63 N. E. 110; 88 A. S. R. 194,

approving the California case of LaRue v. Groezinger.

Therefore, the alleged assignment to the Portuguese-American Bank, in any event, is absolutely void for the reasons above stated.

The sub-contractor Welles is not in the same boat for the reason that the city acted in such a manner as to be estopped from raising objection to his acting as sub-contractor, although he did not obtain the consent of the board of works, as provided by the contract. It is so estopped in fact and as a matter of law, for the reason that the board of works might have refused to recognize him as sub-contractor or to have any dealings with him as such. It did not do so, however, but the plaintiff held on under the contract with the full knowledge of and without any objection from the board of public works (p. 137) and completed the contract. And under the receivers and the trustee appointed by this court Mr. Welles prosecuted the work continuously and to final completion (p. 149). He has received payments from the trustee in bankruptcy on account of the work (p. 149) and his accounts with the bankrupt have been settled and allowed (p. 150), seven thousand, two

hundred twenty-eight dollars and five cents ($7,-228.05) remaining now due him. Under these circumstances it is immaterial that the city did not consent to the assignment.

See note to Mueller v. Northwestern University, 88 A. S. R. at page 205.

No consent, however, was ever obtained by the *bank* to the alleged assignment and no attempt whatever is made to show that the board of public works knew anything about it.

If the court should be of the opinion that the city or board of public works did not act in such manner as to be estopped from raising objection to the sub-contract of Welles and should be of the opinion that both Welles and the Portuguese-American Bank had, the one a void sub-contract, and the other a void assignment, *then the decree should be in favor of the appellant,* John Daniel, as trustee, whose right would be unquestioned, particularly under the amendment of 1910 to the national bankruptcy act, by virtue of which the trustee becomes "an execution creditor" (see assignment of errors No. 10, p. 194).

Point Two.

Should the court be of the opinion the alleged assignment was not void, the contention (secondly) of appellant is that the finding that the parties intended an assignment is not legally justified by the evidence; that the evidence is insufficient to support that finding; and, that the court cannot say the facts amount to an assignment, as a matter of law.

If it be said that Chris Emille, the construction company's president, testified that he understood the notice to the auditor was "an assignment for the bank to draw the money from the treasury" (p. 141), the answer is that, that in itself, is not legally sufficient. The placing of a rubber stamp upon the notice signed by the construction company and addressed to the auditor (p. 141) is not, of itself, sufficient. The statements of Chris Emille and the bank that he intended the said notice, called an "order" by him, as a complete assignment (p. 141), are not of themselves sufficient. The production by Mr. Emille of copies of resolutions passed by the board of works making its preliminary approval of the claims of the construction company, is not of itself sufficient. All these things taken together are not sufficient—not unless we are willing, as the referee in his opinion seems to be willing, to override the principle of decision announced by the Supreme Court of the United States and followed in a recent Oregon case quite similar to this, concerning the indispensability of a *complete*

and *full* surrender of control, *and its execution,* in such cases.

There is one thing that is indispensable; one thing without which there cannot be an assignment; one thing without which there never has been one recognized by any court, without which no assignment ever can be recognized by any court, or inferred by any court; because, without it there can be no equity or good conscience in the claim of anyone that an assignment has been created by conduct, for the reason that his conduct, *in part,* is inconsistent with his claim.

Now, what is this indispensable thing?

It is complete, full, absolute surrender of control of all dominion over the property, or money, or thing, whatever it is, that is claimed to be the subject of an assignment. *"Surrender of control,"* the books say. And they say it emphatically!

This surrender of control must be in such a manner that the holder is authorized to pay the amount directly to the creditor *without further intervention by the debtor.* Complete surrender of all control must have been made in such a way that the *treasurer* of the City and County of San Francisco, the *holder* of the *money* due or to become due to the construction company could pay the money directly to the bank without further intervention of the construction company, without the construction company, keeping any strings on it at all.

Now, what are the facts in the case at bar? There was a *notice* given *not by the bank,* but by the construction company to the city auditor that the bank "is hereby authorized and empowered to draw the warrants" (when issued) "*in favor of the" construction company,* and that notice was taken to the auditor's office and returned to the bank. Nothing remained at the auditor's office whatever and the auditor had not the warrants or claims at the time and did not receive any until about a month later, and after the construction company had become a bankrupt! The warrants were not in existence at the time the notice in question was taken to the auditor's office. The notice, even, was not left there, but was brought back to the bank (p. 141).

The so-called order was never accepted by the auditor; it was merely carried to his office and a rubber stamp with the initials of one of his clerks placed thereon (p. 248). The bank cashier testified:

> "And Mr. Emille in some way he got this stamp on from the auditor's office—'Received Auditor's office December 6, 1910', and brought it back to me, and thereupon they gave us a note for $30,000.00."

No notice was given the board of public works; none to the mayor's office; none to the city treasurer, *the holder of the money;* nothing whatever done (until December 17, 1910) by way of notice to anyone, except the notice taken to the auditor's office *and taken away again immediately.*

No transfer of title to the claims or warrants made in any way whatever, and the claims or demands remained in the name of, *payable to,* THE CONSTRUCTION COMPANY!

No power of attorney was given to the bank or to anyone to sign or endorse that name and *that power therefore remained in the construction company.*

In the notice or writing given to the bank nothing is stated about any loan or assignment or consideration, nor is the power expressly made irrevocable. Nothing on that subject is stated.

Therefore, as the record stands, the bank received power as agent of the construction company to receive the warrants, when they should arrive in the auditor's office and be approved by him. It had no authority to act in its own name. Whatever there was to do, or receive, under the power given in the notice to the auditor was to be in the name of the construction company. The bank was given authority to draw the warrants "in favor of the undersigned" (page 139); and the collection, if and when made, was to be made in the name of the construction company. This is a fair inference from the testimony, the referee finds (p. 161):

> "However, it is a fair inference from the testimony that it was intended by the parties that the method followed in the previous transaction would be followed upon the collection of said demands, that is, that when the warrant was ready for delivery *some officer* of the company would endorse the same in the same manner as upon the previous loan."

The referee also says (p. 162) that it was not the "intention" of the company to reserve any right for its own use or benefit, or at all, either to revoke the order on the auditor or to collect the money. *But there is not a scrap of testimony in the record to support this finding!* On the contrary, the record indisputably shows that the company *did* reserve such a right, no matter what its "intention" may have been (because it had it and did not part with it in any manner).

On the contrary, also, the testimony of the cashier of the bank who made the loan shows that he fully understood that this was the only effect the notice had:

> "The warrants were *made out in the name of the Metropolis Construction Company* and the auditor—the only thing that he had was an *order to deliver* those orders to us, although *our name did not appear* on the warrants, only on the order; * * * " (p. 253).

The claims were and the warrants were to be in the name of the construction company, and no power was given the bank, or anyone else, to endorse the warrants in the name of the construction company. It was so arranged that the bank could not get the money from the city treasurer without the signature of the construction company. The so-called assignee could not avail himself of his security, in other words, without the consent of the assignor!

The power granted was only with reference to the *warrants,* not to their proceeds. So *it would be*

exhausted when the agent (bank) *should receive the warrants in its hands,* and it could proceed no further without new authority from the principal.

The power would have been fully exercised, *and therefore extinguished,* by receipt of the warrants.

The power to draw the warrants would be extinguished necessarily by exercise to the full extent of it, before the bank could arrive at the treasurer's office, *thus requiring intervention of the construction company in voluntary endorsement of the warrant-or payment of the money to the agent.*

These are the undisputed facts in the record, and no amount of "intention" on the part of either the bank officials or the company officials can alter them or change them in any way, shape or manner.

Obviously, any attempt of the bank to endorse the warrants or collect the money would have been in excess of the power conferred and void.

Hawxhurst v. Rathgeb, 119 Cal. 531, 534.

Even if the power were coupled with an interest so as to be irrevocable, it became *functus officio* as having been completely exercised and, therefore, extinguished the moment the warrant could come into the possession of the bank, so that the bank would thereupon be in possession of a check payable to the construction company without any power whatever to collect the money on it.

In the case of Bank v. The City of Portland, the city issued its warrants to a contractor and paid the money to him in face of his previously made order,

delivered to the city recorder, similar in terms to the one in this case. The contractor's assignee sued the city on the theory that the order amounted to an assignment. But the Supreme Court of Oregon thought otherwise; Judge Bean, now one of the judges of the Ninth Circuit, writing the opinion, which is, in part, as follows:

> "An order from a contractor addressed to the city recorder, to deliver to a company, from time to time, as certain work shall be accepted, warrants to be drawn by the city on a certain fund, equal in value to materials furnished by such company used in such work, does not contain words of transfer, or purport to assign an interest in an amount due or to become due from such city to such contractor, and is not directed to the debtor or custodian of the fund, and hence is not a valid equitable assignment of the contractor's claim."

Com. Nat. Bank v. City of Portland, 60 Pac. Rep. 563; 37 Ore. Rep. 33; Dec. by Bean, J.

And the principle governing such cases, to which all parties must conform and which has not been departed from in any case, was announced by Mr. Justice Swayne in his opinion for the Supreme Court of the United States in the case of Christmas v. Russell, as follows:

> "An agreement to pay out of a particular fund, however clear its terms, is not an equitable assignment. The covenant in the most solemn form has no greater effect. The phraseology employed is not material, provided the intent to transfer is manifested. Such an intent *and its execution* are indispensable. The assignor *must not retain any control* over the

> fund, *any authority to collect,* or *any power* of revocation. If he do, it is *fatal to the claim* of the assignee. The transfer must be of such a character that the FUND-HOLDER can *safely* pay, and is compellable to do so, though forbidden by the assignor."
>
> Christmas v. Russell, 14 Wall. 69, 84, 20 Law. Ed. 762.

Please note that not only the intent is indispensable, but its *execution is indispensable,* and that *any* control or *any* power of revocation is fatal to the claim of the assignee.

> "There must, however, be an appropriation of the debt or fund, and the assignor must confer the *complete* right or interest in the subject matter of the assignment on the assignee and *surrender all control* over it, even if the circumstances do not permit the assignee to take immediate possession thereof."
>
> 4 Cyc. 43.

The courts have regarded this matter of absolute and complete surrender of control as the turning point always in such cases. Counsel for the respondent has not cited one single case where the court has permitted an assignment to be inferred from the intention of the parties, where such complete and absolute surrender of control was lacking, nor have counsel for appellants, in their search for authorities, found such a case.

The paper given by the construction company did not authorize any change of the payee to be made in the demand, but, on the contrary, di-

rected that the demand should be drawn "in favor of the undersigned", the construction company. This paper merely gave the bank authority to go to the office of the auditor if and when the warrants should be ready for delivery to the construction company and there to receive the paper just as it was made out, in the name of the construction company.

The power, therefore, was such as to be not only extinguished by its full execution before the holder of it could reach the fourth progress payment, but it was (a) not such as to enable the holder to execute it in his own name; (b) the interest, if any, was not in the subject matter of the power—the warrants—but only in the proceeds of a payment which could come into existence only by full exercise of the power; and (c) the power and the interest did not exist, therefore, with reference to the same thing.

31 Cyc., 1299.

The power, therefore, was *revocable* at the will of the construction company and that company could have demanded the warrants from the auditor at any time, because it does not require any writing or express words to revoke a power that is revocable. It follows that the auditor could have delivered the warrants at any time after December fifth to the construction company without incurring any liability, either personally or officially to the Portuguese-American Bank for so doing.

And the power was *actually revoked* by the appointment and qualification of receivers in the United States District Court on December 23, 1910 (p. 147), and who notified the auditor prior to the approval of the claims by the board of supervisors (p. 148).

Hunt v. Rousmanier, 8 Wheat. 174, 31 Cyc. p. 1299.

The court will contrast the case of

Norton v. Whitehead (84 Cal. 263)

with the case at bar. In the Norton case there was an assignment in writing. In this case there is none. In the Norton case there was a power of attorney giving the assignee authority to execute receipts and instruments. In this case there is none. In the Norton case the assignor gave the assignee a letter of introduction to the secretary of the board, but in the case at bar nothing of that kind was done. Nothing but a notice given in effect that the construction company had appointed the bank its agent to receive the paper warrants—a notice directed to an officer who had nothing to do with the performance of the contract or the payments under it, and having no warrants in his possession at the time, who had not and never would have any *money* with which to make the payment, in his possession, and finally a notice which was taken to the auditor's office and taken away again immediately.

As to the ruling in Christmas v. Russell and the Oregon case holding that not only a mere intent,

but "*its execution*" are indispensable, the referee (p. 171) simply takes issue with the Supreme Court of the United States on that point.

Concerning this, the idea of appellants is that if it can be said that all distinction between legal and equitable assignments is abolished in California, that this does not work any miraculous transformation and does not in one iota diminish the force of Christmas v. Russell. Such ruling would apply with equal force to an assignment, whether it be called a legal or an equitable assignment, and this is the view expressed by Judge BEAN in his opinion in the Portland case. He writes: "But the proof required of an assignment or transfer is the same at law as in equity." So that the brushing aside of legal refinements concerning equitable and legal assignments does not dispose of the question in any particular.

There is undisputed evidence tending strongly to show that the bank really placed reliance upon a mere promise of the construction company to pay out of the particular fund, whatever they may now say to the contrary, notwithstanding! We will briefly notice it:

Appellant Welles' notices to withhold were prior in fact and in point of time to any claim or notice of claim by the Portuguese bank, of an "assignment."

This bank now claims an "assignment." But it never gave notice of any such claim *as that* until after Mr. Welles had served his notices to withhold!

The notices of appellant Welles were served December 10, 12, 15 and 16, 1910 (pp. 149 and 150).

Not until December 17, 1910, did the bank give a notice of the claimed assignment (p. 143). This was after the bank learned (December 10, 1910, the day Welles filed his first notice) that the construction company was in financial difficulties (p. 142); and after the board of public works had recalled the demands from the office of the board of supervisors (p. 143).

The notice of December 5th, to the city auditor that the bank was empowered to draw the warrants, did not give notice of any claim of assignment, contained not a word on that subject!

Besides which, this notice (of December 5) was not given by the bank, but by the construction company, and the bank did not at any time prior to December 17, 1910, give notice of any claim of assignment of the fourth progress payment, so far as the record discloses.

Appellant Welles shows that *his* omission to obtain consent in writing from the board of public works was purely nominal and of no possible consequence by showing *actual knowledge* on the part of the board and its officers *"all the time openly and without any concealment"* (p. 137), but the bank does not attempt to show any actual notice of its claim of assignment to the city or to any proper officer.

A *reason* for this silence on the part of the bank is found in the fact that it could not take an *assign-*

ment without directly violating the terms of the construction company's contract with the city, requiring the consent of the board of public works to be first obtained (p. 137)!

And another reason is found in the fact that the bank officials had an idea the thing "would go right through" (p. 249), because they "hadn't had any trouble before that" (p. 249) on which occasion the money had been *received by L. F. Strong* (p. 251), *the construction company's secretary* (p. 232) *when the cashier of the bank was not present* (p. 251). The other gentleman with the cashier that day was the president of the construction company (p. 253), so that although the bank cashier went up in the company's auto (p. 254), *the city treasurer paid the money on that occasion to the construction company without the presence even of any representative of the bank!*

Subsequently, on examination by his own counsel, this witness appeared to say that he and not Strong, got the money (pp. 252, 253), but not really because he was not asked particularly whether he was present in the treasurer's office when the money was handed over and *the fact remains that Strong receipted the demands for* THE CONSTRUCTION COMPANY!

Beyond any question, therefore, the bank officials *relied for their money on their understanding* that the construction company officials *would endorse the warrants when the bank should get them from the auditor!*

The real reliance of the bank, therefore, *was upon this promise or understanding* with the construction company's officials. Every reason appears to exist why the bank should have relied upon such an unexpressed and revocable "understanding", because it "had no knowledge, information, or belief that the company was not a solvent corporation" and "believed the reputation of the company, financially, to be good at all times" (p. 142).

And as this, *at most,* amounted to no greater than a *revocable understanding,* a "promise to pay out of a particular fund", entirely unexpressed, it cannot be held an assignment, no matter how solemnly made, nor under what circumstances.

Christmas v. Russell, *supra.*

So far as the appellant Welles is concerned this record, therefore, discloses fully that he diligently and timely filed his notices, diligently appeared and presented his claim in the bankruptcy court, and actually gave notice to the city officials of his work under the contract, so that his omission to get a formal consent was of no consequence.

Contrasted with this is negligence on the part of the bank in *not* notifying any city official of its claim of "assignment" or getting the consent of the board of public works (a provision evidently intended for the protection of sub-contractors like Welles, whom that board *knew* to be doing the work as sub-contractor) and finally absolute failure of the bank in any manner to obtain complete control

of the fund they afterwards claim as secured to them if they were not relying upon a mere unexpressed understanding with the officers of the construction company that they would enable the bank to get the money out of the particular fund, by subsequently endorsing the warrants and paying the loan out of the proceeds. A mere promise!

Thus the essence of the transaction appears to be that the bank really relied, not on any assignment of a fund over which it had "complete control"; but on the promise of the construction company that it would pay out of a particular fund which the construction company, and not the bank, retained the right to collect, or to have a hand in collecting, which amounts to the same thing; the saying, "He who hath a partner, hath a master" being as true concerning this matter as any other.

It is respectfully submitted, therefore, that the bank had no assignment on December 10, 1910, nor December 15, 1910, when appellant Welles' notices to withhold became effective.

Point Three.

PRIORITY.

The appellants, thirdly, contend that Welles is entitled to priority in virtue of his notice to withhold, under Section 1184 of the Code of Civil Procedure of the State of California (applicable to this case). The provisions of Section 1184 as it existed at the time, are as follows:

> " * * * any of the persons mentioned in Section eleven hundred and eighty-three, except the contractor, may at any time give to the reputed owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the reputed owner, or that they have agreed to do so, stating in general terms the kind of labor and materials and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both.
>
> "(Notice, how served.) Such notice may be given by delivering the same to the reputed owner personally, or by leaving it at his residence or place of business, with some person in charge, or by delivering it to his architects, or by leaving it at their residence or place of business, with some person in charge, or by posting it in a conspicuous place upon the mining claim or improvement.
>
> "No such notice shall be invalid by reason of any defect of form, provided it is sufficient to inform the reputed owner of the substantial matters herein provided for, or to put him upon inquiry as to such matters.
>
> "(Withholding from contractor the amount.) Upon such notice being given, it shall be the

> duty of the person who contracted with the contractor to, and he shall, withhold from his contractor, or from any other person acting under such reputed owner, and to whom by said notice the said labor or materials, or both, have been furnished, or agreed to be furnished, sufficient money due, or that may become due to such contractor, or other person, to answer such claim and any lien that may be filed therefor for record under this chapter, including counsel fees not exceeding one hundred dollars in each case, besides reasonable costs provided for in this chapter."

This section has been held to apply to a sewer fund in possession of the city.

Goldtree v. San Diego, 8 Cal. App. 509.

On December 10 and 15, 1910, Welles fully complied with the provisions of this section by serving notices. The only question is whether the bank had a prior right at that time. Appellants contend that this statute was the law at the time the contract was made and is to be read into every contract between the city and its contractors, or between them and their sub-contractors, and that the bank is bound by it.

Appellants further contend that the fourth progress payment on the Fourth and Kentucky street sewer was not *matured,* and could not be *matured* until after it received the approval of the board of supervisors and the mayor. The board of public works might initiate the passage of the demand through the channels necessary to *mature* it, but the action of this board was only initiative; it took the

final action of all of the administrative or executive branches of the city government except the auditor and treasurer, before the payment could be said to be *matured,* so as to exclude a sub-contractor with a notice under Section 1184, Code of Civil Procedure!

This seems quite reasonable, and the reasoning is further borne out by the fact that the city charter requires (p. 22) that all these warrants *shall be advertised in a newspaper for a certain number of days* before they are finally passed by the board of supervisors. Unless the purpose is to give material men and laborers the opportunity to file their claims of lien within this time the publication of such intention to pass a resolution finally approving payment on a contract is of no effect whatever. The publication or advertising serves the purpose of giving such notice to material men and laborers, so that they might file liens. Therefore it is reasonable to conclude, under any ordinary use of human language, that the payments on a city contract cannot be said to have *matured* until at least they receive the approval of the board of supervisors.

The referee, in his opinion, states that the payments were *due* when they were passed by the board of public works. If this is true in any limited sense, nevertheless it is not true in the sense that is usually meant by the word "due". See "Words and

Phrases", "Due", Vol. 3; "As *matured",* p. 2216; "As *now payable",* p. 2217. In this sense of *"maturity",* the payments were neither "matured" nor "now payable", until they had received the approval of the board of supervisors, and could not *mature* until then, because it was not until such time that anyone could have made a demand upon the treasurer for the money.

The Supreme Court of the State of California has construed Section 1184 of the Code of Civil Procedure with reference to this very matter, and its construction, of course, is binding on this court. If we read the opinion in that case with this view of the *maturity of the payment* in mind, we can come to but one conclusion, namely, that the purport and intent of the Supreme Court in its opinion in that case was to lay down the rule that payments on contracts were subject to liens under notices to withhold up to the time when they were *matured,* so as to enable the one in whose favor they were to demand payment *from the fund-holder,* whether he was county treasurer or state comptroller. The Supreme Court in its opinion in the case in question was very careful, not only to use the word *"matured",* but to refer to it as the "time of matured payment", as the time when the installment on the contract price should be due and *payable immediately.*

For convenience, quotations from the opinion on this point are subjoined:

> "The contractor cannot prevent the effect of this notice as to any payments that may *mature* after it is given, but its effect upon payments that have *matured* before it is given but which have not been made, is to be determined by the rights of the contractor with reference to them." (125 Cal. Rep., p. 589, line 23.)
>
> "If he is still *entitled to demand their payment from the owner,* such payment is intercepted," etc. (p. 589, line 27.)
>
> "The provision * * * rendered such installments of the contract price *due and payable immediately",* etc. (p. 589, paragraph and top line of p. 590.)
>
> The Newport Co. v. Drew, 125 Cal. 585-589.

If this be the proper construction of the law with reference to these notices to withhold; if the payments in the case at bar, in any ordinary sense of the term, are said to be *matured* not until they have received the approval at least of the board of supervisors, then the notices to withhold given by Mr. Welles, December 10 and 15, 1910, operated to intercept them, and he has a prior right as against the Portuguese-American Bank to the fourth progress payment.

Certainly the construction company had no right to "demand payment" from the *city treasurer,* or from anyone else at the time these claims were approved by the board of public works—it had no

right at all to *immediate payment* at that time, because the claims had first to be advertised in the official paper and then to pass the board of supervisors and the mayor!

It is equally certain that the board of public works did not look upon its approval as final or in any measure entitling the construction company to demand immediate payment, because on December 12, 1910, it recalled this (and other) demands from the offices of the board of supervisors (p. 143) and retained them there until about December 26, 1910 (p. 145), so that at the time the bankruptcy proceedings were commenced, December 19, 1910, the claims were still in possession of the board of public works! Surely, up to this time, if the claims were really in a sense "due" the construction company there was nothing either "immediate" or "immediately payable" or "matured" about such dueness —nothing that could reasonably be said to entitle the construction company to demand immediate payment at all.

Not only this, but by the very terms of the contract, the payments at this stage were liable to be *withheld* (p. 136).

If, therefore, there was a sum of money earned and remotely "due" on December 15, 1910, it was *then* not *"payable"*, nor *"immediately payable"*, not in any sense *"matured"*, not then in such a situation as to enable the contractor to make a demand

for payment or for a warrant, or to entitle him in any way to call upon the city treasurer for the funds, and, consequently (construing the Newport Wharf Co. case so as to carry out its intent and the intent of the city charter with reference to material men's claims) subject to be withheld under Section 1184, Code of Civil Procedure, of the State of California.

In other words the "payment" was not in a position so that the contractor could by assignment cut out any rights acquired by stop notice served prior to approval of the claims by the Board of Supervisors.

To summarize, then, the court erred, in not holding that the opinion and order of December 12, 1911, adopting the report of the special referee and examiner, as the law of the case, were and are conclusive; in not holding that the alleged assignment was void because of failure to obtain consent; in holding that the Portuguese-American Bank should be regarded as the assignee of the fourth progress payment; and in holding said bank entitled to priority of payment in preference to appellant Welles. For each of which reasons the decree should be reversed, with directions that a decree be entered in favor of complainant for relief as prayed; or, if the court be of the opinion appel-

lant Welles is not entitled, then in favor of appellant John Daniel, as trustee, etc.

San Francisco, California,
October 6, 1913.

Respectfully submitted,

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P. F. Dunne,
W. I. Brobeck,
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B. M. Aikins,
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C. A. S. Frost,

Counsel for Appellant, Paul I. Welles.

INDEX.

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES and JOHN DANIEL, Trustee of Metropolis Construction Company (a corporation), Bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),
Appellee.

BRIEF FOR APPELLEE.

Statement of the Case.

On or about July 22, 1910, the Board of Public Works of the City and County of San Francisco entered into a written contract with Metropolis Construction Company (hereinafter designated as the Company) for the construction of certain sewer work in Kentucky and Fourth streets. That contract provides that the work will be done under the direction and to the satisfaction of said Board of Public Works (p. 26 Tr.) and also provides

for progress payments for labor and material incorporated in the work, to be based on monthly estimates by the City Engineer (p. 135 Tr.). It further provides that on each such estimate being made, the City and County of San Francisco will pay or cause to be paid, in the manner provided by law, an amount equal to 75 per cent of the estimate. It further provides, under "SUB-CONTRACT" heading, that the contractor shall not sublet the whole or any part of the work without permission of the Board of Public Works, and that to obtain such permission a copy of the contract for subletting must be filed; also, that the contractor shall not assign moneys payable under the contract without like consent of the Board (pp. 136-137 Tr.).

On or about July 30, 1910, this contract was sublet to Paul I. Welles by the company, without the formal consent above required (p. 137 Tr.). But Mr. Welles acted on the job with the knowledge of the Board.

The Charter provisions relating to contracts of this kind are contained in Chapter I of Article VI. Section 21 provides for progress payments. Section 22 provides that the work must be done under the direction and to the satisfaction of the Board of Public Works. Section 11 provides for the appointment of a City Engineer who shall certify to the progress and completion of the work.

Between the commencement of this work and December 5, 1910, three progress payments had been made (p. 138 Tr.), the demand for the third of which had been received by the cashier of the Portuguese-American Bank (hereinafter called the Bank) under a transaction similar to the one now in question, and the cash proceeds thereof taken away by him from the city Treasury (pp. 144-145 Tr.).

On December 3, 1910, the City Engineer made his fourth estimate (p. 217 Tr.) of progressive work under the contract, which was approved by the Board of Public Works on December 5, 1910. On the same day the Board of Public Works by resolution authorized a fourth progress payment of $6830.85 to be made to the company (p. 256 Tr.) and on the same day a demand for that sum was presented by the Metropolis Construction Company and approved by the Board of Public Works, and was forwarded to the Supervisors of the City (pp. 138-213 Tr.). *Said resolution has never been revoked.*

On December 5, 1910, Chris Emille, within the scope of his authority as general manager of the company, accompanied by L. F. Strong, assistant secretary, went to the Bank for the purpose of obtaining a loan of $30,000. The Bank required collateral security for the loan, and the company offered to assign to the Bank as such security three certain demands on the Treasury of the City and

County of San Francisco (including the one in suit), and the moneys represented thereby, and produced an order on the Auditor of said City and County authorizing and empowering the Bank to draw the warrants in favor of the company for the amount of money therein set forth,—specifying the amount of the fourth progress payment $6830.85, and two others (p. 139 Tr.). With this order the company offered a certified copy of a resolution of the Board of Public Works which allowed the company the sum of $6830.85 as fourth progress payment under the contract. The Bank required that the order be presented at the Auditor's office and accepted by the Auditor, before it would loan any money thereon. The company complied with that requirement, and, leaving a copy with the Auditor, had the original stamped, "Received Auditor's Office Dec. 6, 1910, Ans. H. J." The order was again presented at the Bank on December 6, 1910, and the Bank loaned the money, taking the order as security for the company's note, the company understanding the order to be a "complete assignment of the full amount of the three warrants set forth therein" (p. 141 Tr.). Thereafter, and on December 7, 1910, at the request of the company, the Bank loaned it five thousand ($5000.00) dollars additional, to pay labor, on the same security. The warrant mentioned in the order, for the fourth progress payment, is the demand sued for in this action. All the money loaned was drawn out on the

company's checks, with the exception of one and 6/100 ($1.06) dollars, and has not been repaid.

Neither the president of the Bank, who made the loan, nor the cashier, had any knowledge, information or belief that the company was not solvent at the times the loans were made, and did not know and had no cause to suspect bankruptcy (p. 142 Tr.).

The record shows that at the times the loans were made no notice by appellant Welles was on file requiring the City to hold back money to pay him on his subcontract, and that his subcontract was not on file with the Board of Public Works.

After the making of these loans by the Bank on December 6 and 7, 1910, appellant Paul I. Welles on December 12 and 16, 1910, served notices on the City to withhold money due or to become due to the company, under Section 1184 of the Code of Civil Procedure of this State.

Thereafter, on December 19, 1910, a petition in *involuntary* bankruptcy was filed against the company, and in due course it was, on January 5, 1911, adjudged a bankrupt. On February 1, 1911, John Daniel was appointed trustee.

That on January 26, 1911, the Bank filed suit in the Superior Court of the City and County of San Francisco, State of California, against Thomas F. Boyle, Auditor of the said City and County, wherein it claimed title to said demands and

prayed that said Auditor should be required to deliver to it the possession thereof.

While said suit was pending, and on April 18, 1911, appellant Welles filed the present suit in equity in the District Court, against the Bank, the trustee in bankruptcy of the company, and Auditor Boyle.

Upon the filing of this suit in equity, an order was made requiring the defendants to show cause why the Auditor should not approve the demand and deliver it to the trustee to abide the result of the action and why the Bank should not be enjoined from prosecuting the suit in the State Court (p. 45 Tr.).

On June 27, 1911, the Bank filed its amended return to this order to show cause (p. 54 Tr.).

On July 3, 1911, the Auditor filed his amended return and answer to the order to show cause (p. 64 Tr.), and on July 10, 1911, Paul I. Welles filed his replication thereto.

Thereafter, on July 11, 1911, the case was referred to the Referee to hear the testimony and find the facts on the issues made by the pleadings; and the Bank was in the meantime restrained from prosecuting the mandamus suit in the State Court (p. 78 Tr.).

Thereafter hearings were had upon said reference before the Referee which were concluded on September 5th, 1911, when the matter was submitted to him (p. 92 Tr.).

The report of the Referee finding the facts was filed October 14, 1911; and, no objections having been taken thereto, it was ordered confirmed on December 12, 1911.

In a "memorandum opinion" filed on that day the judge concluded that complainant was entitled to the relief demanded in the bill of complaint; and that this was not a bankruptcy proceeding, but an independent suit in equity (p. 113 Tr.). On this opinion a "minute order" was entered by the clerk December 12, 1911.

But as this was a report upon an order to show cause, wherein the issues were not joined by answer of either the Bank or the trustee, no decree was ever taken on the "memorandum opinion".

On December 13, 1911, a formal order was made and entered disposing of the issues on the order to show cause, and on this order a writ of injunction and mandamus was issued (p. 116 Tr.).

After the reference on the order to show cause, and on September 5, 1911, the trustee filed his answer to the bill of complaint.

Thereafter and on October 6, 1911, the Bank filed its answer to the bill of complaint (p. 81 Tr.).

On October 16, 1911, complainant filed his replication to the answer of the Bank; and on October 19, 1911, he filed his replication to the answer of the trustee (pp. 113-112 Tr.).

Thereafter, on December 26, 1911, the case was on motion of C. A. S. Frost, Esq., referred to the

Referee on final hearing to hear the testimony and proofs and find the facts on the issues arising on the pleadings, and to report his findings and conclusions to the court (pp. 119-120 Tr.).

Thereafter on March 8, 1912, the Referee filed his report under the last order, and seemed to think his former findings, as confirmed, were *res adjudicata* on this hearing, because of the opinion expressed by the Judge in the memorandum of December 12, 1911 (p. 120 Tr.), and asked instructions as to further proceedings, if any.

To this report and finding the Bank filed exceptions April 6, 1912 (p. 125 Tr.).

These exceptions, and a motion by complainant to amend the prayer of his bill, were heard on April 15, 1912. The exceptions were sustained and the motion to amend granted. The cause was again referred to the Special Referee and Examiner to ascertain and report the facts and his conclusions of law therefrom, on the testimony taken and on file without reference to the findings and report upon which the preliminary injunction was based (p. 128 Tr.).

Thereafter, on July 16, 1912, the Special Referee and Examiner filed his findings of fact and conclusions of law on final hearing, finding that the fourth progress payment was assigned to the Bank and that the assignment and right of the Bank to receive the proceeds thereof were not affected by

the notices to withhold made by Welles (pp. 132 to 172 Tr.).

On August 14 and 16, 1912, Welles and the trustee respectively filed their exceptions to this report (pp. 172, 180 Tr.).

Thereafter and on January 18, 1913, the Court made and entered its order confirming this report, and directing a decree for appellee (p. 185 Tr.).

Thereafter and on January 30, 1913, the decree in favor of the appellee was signed by the Judge (p. 186 Tr.).

The learned Judge of the Court below, in the portion of the opinion (p. 184 Tr.) criticised by appellants, merely states, that what on first blush appeared to be strong equities in the appellant Welles, faded away upon a consideration of the facts. This was not necessary to the decision, and the opinion would have been complete without it. It is not the basis of the opinion, but merely an independent balancing of equities,—the Court pointing out how Welles could have amply protected himself, under the law, against assignments and all other contingencies.

We otherwise agree with appellants that if Mr. Welles' notices to withhold were within time under Section 1184, Code of Civil Procedure of California, no laches are imputable to Welles. But on the other hand, if they were not within time, laches are likewise immaterial. But, as the appellant Welles had strenuously contended that he had strong

equities, it was only natural that the learned Judge who wrote the opinion should have adverted to the point, although it could not weigh with the Court if the Bank's assignment was made after the fourth progress payment fell due.

We will now consider the contentions made by appellants, taking up the consideration of each point in the order discussed in their brief.

REPLY TO APPELLANTS' FOURTH POINT.

Appellants' contention, numbered four on page 18 of their brief, and discussed first, is that the "memorandum opinion" and "minute order" of December 12, 1911 (pp. 113, 114 Tr.), "is conclusive as the law of the case, and fixes the right of complainant Welles to have a decree entered in his favor in the absence of new or changed facts or findings of fact in the Referee's final report."

Before proceeding to show that appellants' point number four is untenable, we desire to advert to several statements found in their discussion thereof which we claim find no support in the record.

In the first place, on December 18, 1911, the cause was not *ordered back* to the Referee for final hearing, but was on December 26, 1911, *ordered referred* to the Referee on final hearing, *to hear the testimony and proofs* of the parties, *to find the facts* upon the issues arising upon the pleadings, and to *report* his findings and con-

clusions to the Court (p. 119 Tr.). This is an independent order of reference, and we wish to emphasize this fact, because much of appellants' argument is founded on loose language.

In the second place, the Bank excepted to the second report of the Referee on the ground, among others, that the Referee erred in treating the confirmation of his report on the hearing of the order to show cause as *res adjudicata as to the facts and relief* (p. 126 Tr.) and not, as appellants would represent, as to the *facts alone.*

In the third place, on April 15, 1912, the Court did not return the matter to the Referee on final hearing, to give *the bank an opportunity* to produce further proof, or expressly or otherwise giving any party a *chance* to introduce further proof. A glance at the order (p. 128 Tr.) will show how misleading this statement is. The Special Referee and Examiner is required to ascertain and report the facts and his conclusions of law therefrom,

> *"on the testimony taken and on file herein, on the issues joined, without any reference to the findings and report on which the preliminary injunction was based."* (Italics are ours.)

"On the *testimony taken and on file herein*": does that permit of "a chance to introduce further proof"? On the contrary, the *merits* were *open* for findings and conclusions upon the testimony *then in, without reference* to any former findings or report.

Our object in mentioning the foregoing matters is to dispel any idea that the second or third order

referring the case to the Referee, was for the purpose of giving the Bank *a chance* to introduce further proof. If for any purpose at all, it was for the purpose of throwing the whole case open for a consideration on its merits (4th exception p. 126 Tr.). The Court absolutely repudiated any inference that it had *decided the merits.*

It is rather difficult to grasp the exact point made by appellants, in their fourth specification. In the last paragraph on page 22 of their brief, they state that the *report*, as confirmed on December 12, 1911, is *the law of the case*: in the second paragraph on page 23, they say that the *ruling* became *the law of the case;* and then, on the latter page, they quote from a decision by Judge Van Fleet, which holds that the *principles announced* in an opinion became the *law of the case.*

What, then, is the *law of the case?* The *report* of the Referee? The *"memorandum opinion"* of December 12? Or, the *principles announced* in the "memorandum opinion" of December 12?

The record upon which the "memorandum opinion" was based did not include the answers of the Trustee or the Bank (p. 93 Tr.). The object of the suit was the trial of a question of title, and the relief asked, and awarded at that preliminary stage of the suit, was injunctive, to preserve the *status quo* and to insure the power of the Court to enforce its ultimate decree (p. 115 Tr).

Now, the case up to and including December 12, 1911, was still open for the proper decree. On the next day, *December 13,* the first "solemn ruling" was made. Here is a formal order (p. 115 Tr.) granting complainant *specific relief,* drawn and presented by *counsel for complainant, signed* by *"John J. De Haven, District Judge,"* and filed December 13, 1911. Then, on the 15th day of December, 1911, a *writ of injunction and mandamus* (p. 116 Tr.) was issued.

No decree having been given or entered upon the "memorandum opinion" and "minute order" other than the order of December 13th, which was *signed by the judge,* it must be conclusively presumed that this order, which was the last deliberate direction to the clerk, was the ruling and only ruling, at that stage of the case. This finds ample support in the following authorities:

Estate of Cook, 77 Cal. 227, 11 Am. St. Rep. 267;

Byrne v. Hoag, 116 Cal. 1;

O'Brien v. O'Brien, 124 Cal. 422;

Belger v. Sanchez, 137 Cal. p. 618.

Law of the case applies only to decisions of appellate Courts, and it is not only within the power, but it is the duty, of a *nisi prius* Court to change its ruling of law during the progress of a case when such ruling was erroneous, and was not followed up by an appealable order.

Lawrence v. Ballou, 37 Cal. p. 521.

But, since the "memorandum opinion" cannot be looked on as stating *the law of the case,* can it be regarded as *res adjudicata* of what was never adjudged?

If the memorandum opinion was ever intended to have the effect contended for by the appellants (which we deny), then the Court was at liberty to change that opinion at any time before a decree was entered.

In other words, the lower Court is absolutely footloose, at all stages of a case pending therein, to change its opinions, until it has deprived itself of the power to do so by the giving and entering of an appealable order or decree, and that order or decree, and not the opinion once held by the Court, is the ruling on the matters therein adjudged.

> "It is a most common occurrence for a trial Court to change its rulings during the progress of a trial, upon questions of law, and no one would contend that it is not within its power to do so, or that it should not do so when satisfied that its former ruling was erroneous."
>
> De La Beckwith v. Superior Court, 146 Cal. p. 499.

As no *final decree* was ever made or entered on the "memorandum opinion" and "minute order" of December 12, 1911 (which were merely *directions for a decree*), and as the Court changed its opinion and substituted in its place *that of January 18, 1913* (p. 183 Tr.), which was duly followed by *minute order* (p. 185 Tr.), ordering a decree for the Bank

in accordance therewith, which was duly followed by a *final decree,* the first and only one in the cause (p. 186 Tr.), the doctrine of *res adjudicata* has no application.

See Freeman on Judgments (4th Ed.), Sec. 251.

These observations eliminate Loewe v. Federation of Labor, 189 Fed. 714, as an authority in point. There, an order for injunction was made and a writ of injunction issued on the preliminary hearing; here, no order was made prior to final decree except that of December 13, 1911. There, the ultimate relief was injunction; here, was involved a question of title, and the preliminary relief was only *collateral* to the issue. There, the opinion of Judge Morrow (139 Fed. 71) announced *"principles"* which Judge Van Fleet found were *supported* by the *facts* on final hearing; here, the "memorandum opinion" announces *no principles.*

Again, injunction suits are peculiar in that the ultimate relief is of the same quality as the interlocutory relief. Hence, if an interlocutory injunction has been granted after a hearing, and the facts on final hearing support the interlocutory order, there would be *strong reason* for perpetuating the injunction. But we submit that the rule of reason goes no further than that.

The application of that rule would have justified the decision in the Loewe case. But to hold that the "principles announced" in an opinion in a

Court of *nisi prius* become "the law of the case," as an absolute rule binding the action of that Court on final hearing, even though error should appear, is not, we submit, supported by authority.

Rodgers v. Pitt et al., 129 Fed. 932;
High on Injunctions (4th Ed.), Sec. 5;
Andrae v. Redfield, 12 Blatchf. p. 425.

Finally, the memorandum opinion of December 12, 1911, merely states that * * * "it is my conclusion that the complainant is entitled to the relief demanded in the bill of complaint."

Now, *at the time of this opinion,* what was the relief demanded in the bill of complaint?

It was merely (in substance):

That the auditor be required to surrender the demand on the City Treasury to the Trustee;

That the Trustee be required to account with complainant;

That the Portuguese-American Bank be required by due process of this Court *to make answer* to the bill and *to assert in this Court* its claim to said warrant and to *abide the judgment* of this Court;

That the bank be enjoined from *further proceeding* with its *mandamus suit* in the State Court (p. 24 Tr.);

Subsequently, on *April 16, 1912,* complainant, by leave of Court, filed an *amended prayer* to his bill of complaint demanding *further* and *more specific relief* (p. 128 Tr.).

As the answer of the Bank was not before the Referee, its time to plead not having expired, any opinion of the Court upon the merits of the action would have been premature, and it is not to be presumed that the expression of opinion in the memorandum meant anything more than that complainant was entitled to the relief asked for in the order to show cause.

Such was the construction placed upon the "memorandum opinion" by all parties (see appellants' brief on this point, pp. 7 and 8), for the actual decree that was entered, aside from confirming the report, granted an injunction *pendente lite* against the Bank and ordered Auditor Boyle

> * * * "to deliver the same (the demand) to defendant John Daniel as Trustee herein, to abide the result of this action the proceeds to be distributed to whomsoever *shall be lawfully entitled.*" (Italics are ours.)

If this was not the decree to which Mr. Welles was entitled under the "memorandum opinion," then why did he take that order?

In conclusion, we submit that this highly technical contention of appellants, so persistently urged before Judge De Haven, himself, and by him overruled (p. 128 Tr.); and before Judge Dietrich, and by him overruled (p. 183 Tr.), is not only unsupported by reason or authority, but is utterly untenable on the record.

REPLY TO APPELLANTS' POINT ONE.

Appellants now contend that the assignment from the Metropolis Construction Company to the Bank is absolutely null and void because of a provision in the contract that the moneys payable thereunder shall not be assigned without the consent of the Board of Public Works.

This point was not made when the matter was submitted to Judge Dietrich.

This point was briefed by the Bank while the matter was before the Referee and the appellants abandoned it then. In brief filed with the Referee, dated February 15, 1912, on page 16, appellants state:

> "It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank has wasted its discussion of that point, on pages 4, 5 and 6 of the brief."

The Referee found (p. 152 Tr.):

> "The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city."

No exception to this finding of the Referee was taken.

This finding was adopted by the Court (p. 183 Tr.) and *no assignment of error is based thereon.*

We believe this point cannot be considered now on appeal, but as it is presented we will again show there is no merit in it.

The provision in the contract between the city and the company relating to the assignment of payments is in only that portion of the specifications annexed to the contract entitled "Subcontract".

These provisions are set out on pages 136 and 137 of the Transcript.

These provisions commence with "Subcontract," and, ordinarily, the matters therein would be held to refer to "Subcontract". To sublet or to assign the contract consent is required.

The extract from these provisions set out on page 25 of appellants' brief will mislead unless the full paragraph is considered.

It is:

> *"No subcontract shall relieve the contractor of any of his liabilities or obligations under this contract.* He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works." (Italics are ours.)

The obvious meaning of this paragraph is that if the contractor sublets, he shall not assign the

payments to the subcontractor, without consent. It does not mean that when the money is due the contractor, he cannot go to a bank and get a loan upon the security thereof.

> "Nor does it (provision against assignment) prevent assignment as collateral security."
>
> Page on Contracts, Vol. 3, p. 1943, Sec. 1263.

Again the words, "moneys payable" and "claim thereto" may very well refer to future earnings. The policy of the law does not in a case of this kind prohibit the assignment of money already earned and ordered paid.

> "A provision against assignment without consent of the adversary party does not prevent a party who has performed from assigning his right to compensation."
>
> Page on Contracts, Vol. 3, p. 1943, Sec. 1263.

The company had already earned this payment (pp. 96, 138, Tr.).

The specifications in that respect should receive a reasonable and liberal construction, so as to carry out the spirit of the progress payment provisions of the Charter and the contract, viz.; "to assist the contractor to *prosecute the work advantageously*" (p. 135 Tr.).

But assuming that in *this case* the consent of the Board of Works should have been obtained, what then? The contract does *not* provide that the assignment shall be *void.* They may not be as-

signed without consent. If they are, who can complain? Only the City.

Such a provision is for the benefit of the City alone, and *no one else* can complain of its breach; and such assignment is *not rendered void.*

> "An assignment by a contractor as security for a debt of all moneys to become due to him from a City, is not rendered void by a provision in the contract against assignment, such provision that neither the contract nor any of the moneys payable under it shall be assigned without the consent of the City in writing, is but for the protection of the City and can be availed of only by the City. A junior assignee of the moneys cannot avail himself of the provisions to obtain a more favorable position in the order of payment."

Fortunato v. Patten, 147 N. Y. 277;

Jones, Pledges and Coll. Securities (3rd Ed.), p. 143, Sec. 136a.

> "It was strenuously urged on the argument by the counsel for the bank that the disposition of this case by the Court below is justified by Burck v. Taylor, 152 U. S. 634. It is sufficient to point out that the case cited dealt with a contract made by an individual with the State of Texas, which contained an absolute, unqualified covenant that it should not be assigned in whole or in part without the written consent of the State.
>
> "In the case at bar the substance of the covenant is that if the contract or any part of the moneys due under it are assigned without consent no claim can be asserted by virtue thereof against the City.
>
> "In the case at bar no absolute assignment has been made of the contract, but all transfers

were of moneys due thereunder as collateral to secure the payment of a debt.

"*There is a wide difference between assigning moneys due under a contract and an absolute assignment of the contract itself* as the latter act disturbs that relation of personal confidence which exists between one desiring work done that requires a high order of skill and intelligence and the contractor he may have selected as possessing these necessary qualifications (Delaware County v. Diebold Safe & Lock Co., 133 U. S. 479).

"For that reason, we think the case of Burck v. Taylor has no application to the case before us." (Italics are ours.)

Fortunato v. Patten, 147 N. Y. 277.

Where contract provisions or the policy of the law prohibit assignments, it has been repeatedly held that an assignment for security is not within the prohibition.

Jones, Pledges and Coll. Securities, 3rd Edition, p. 143, Sec. 136a; also on p. 181;

Page on Contracts, Vol. 3, p. 1943, Sec. 1263;

Fortunato v. Patten, 147 N. Y. 277;

Curtiss v. Aetna Life Ins. Co., 90 Cal. 245, at page 252;

Butler v. Rockwell, 14 Colo. 125;

Crouse v. Mitchell, 130 Mich. 347, 97 Am. St. Rep. 479;

See note to Mueller v. Northwestern University, 88 Am. St. Rep. at page 206.

Butler v. San Francisco Gas & Electric Co., cited by appellants, is a decision of the District Court of

Appeal of California and is not an authority as a rehearing therein was granted by the Supreme Court of California on July 28, 1913, and the matter is now pending. Five judges of the Supreme Court signed the order granting a rehearing.

Burck v. Taylor has been shown in extracts from Fortunato v. Patten, 147 N. Y. 277, set out above, to have no application to a case like the one at bar.

The cases cited by appellants establish what we do not dispute: that a clause in a contract prohibiting the assignment of the *contract itself*—may be enforced.

Appellants' argument goes to show such provisions in contracts against assignability, at most, can be invoked only by the City.

If the provisions in the City's contract render an assignment or subcontract void without the consent of the City, then Welles subcontract is void as he did not obtain such consent (the procedure for obtaining which is explicitly set forth in the contract). Appellants argue that the City is "estopped" from raising this objection. If it is "estopped" it is because such provisions can be invoked by the City only.

The Trustee in bankruptcy has no greater rights than an "*execution creditor*" and the rights of an *execution* creditor are subordinate to those of an assignee whose rights accrued prior in time.

The Bank's rights date from December 6th, 1910, while the Trustee's date from December 19th, 1910, the date of the filing of the petition in bankruptcy.

REPLY TO APPELLANTS' POINT TWO.

The point is, that the finding that the parties intended an assignment is not legally justified by the evidence; that the evidence is insufficient to support that finding; and, that the Court cannot say the facts amount to an assignment, as a matter of law.

Before proceeding with this point, we desire to call attention to some inaccurate statements contained in appellants' discussion thereof.

Appellants state, page 31 of brief, "The notice, even, was not left there, but was brought back to the Bank (p. 141 Tr.)". This idea is repeated several times.

The findings of the Referee (p. 141 Tr.) show that Mr. Strong on December 6th, 1910, "left a copy of said order (the notice mentioned by appellants) with the Auditor". This is supported by the evidence (p. 230 Tr.).

Appellants' statement, pages 36, 37, of brief, that the paper given by the construction company, "directed that the demand should be drawn 'in favor of the undersigned', the construction company," is incorrect. By the omission of the last

portion of the sentence, appellants change, or attempt to change, its meaning.

The paper notifies the Auditor that the Bank "is hereby authorized and empowered to draw the warrants in favor of the undersigned *against city and county* (p. 139 Tr.). (Italics ours.)

Appellants' statements, page 41 of brief, that on the occasion of the collection of moneys on a prior assignment "*the money had been received by L. F. Strong* (p. 251), *the construction company's secretary* (p. 232), *when the cashier of the Bank was not present*" (p. 251), and, "*the City Treasurer paid the money on that occasion to the construction company without the presence even of any representative of the Bank,*" are wholly unsupported.

There is absolutely no evidence that Mr. Strong collected this money or that the Bank's representative was not present when it was paid. On the contrary the testimony shows the cashier of the Bank received the money from the Treasurer.

Appellants' reference to p. 251 of the transcript does not show that L. F. Strong collected the money. It shows that witness Lewis testified "I was not in the Treasurer's office when these demands were paid; I don't know who received the money on these warrants."

Mr. Figueiredo, the Bank's cashier testified (p. 252, 253 Tr.), "Then I took the warrants to the

Treasurer and got the money". "I received the money and not Mr. Strong".

This is the only testimony or evidence touching the collection of the money on the prior assignment, and the above statements of appellants are absolutely unwarranted.

Appellants' argument seems to be, that to support the Bank's assignment it will be necessary to hold that "surrender of control" is not a necessary element of a valid assignment. They intimate that the Referee did not consider it necessary, and that he takes issue with the Supreme Court of the United States on this point.

We agree, and never disputed, that "surrender of control", as *understood by the Courts,* is necessary to a valid assignment.

We believe the principles announced by the Supreme Court of the United States in the decision in Christmas v. Russell to be sound and we do not expect this Court to override them. The Referee was not willing to override them, but he would do so *if* they were in conflict with the decisions of the Supreme Court of California. The Referee's opinion that the property rights of these parties (all citizens of the State of California), should be determined according to the statutes and decisions

of the Supreme Court of the State of California is correct.

> Butcher v. Cheshire R. R. Co., 125 U. S. at page 583;
>
> Rose's Code of Federal Procedure, Vol. I, under Sec. 10, notes (a), (aa) and (b).

However there is no inconsistency between Christmas v. Russell and McIntyre v. Hauser, 131 Cal. 11, the cases mentioned by the Referee.

The Referee compared the case at bar with Christmas v. Russell and stated (p. 170 Tr.):

> "Considering the matter from the standpoint of an equitable assignment, I am also of the opinion that the facts of the case constitute an equitable assignment within the rule of Christmas v. Russell, above referred to."

In the case at bar there was not only an intention to assign but there was also an execution of the intention.

The question in the mind of the Referee at the time he compared Christmas v. Russell and McIntyre v. Hauser (p. 171 Tr.) and which has aroused appellants' criticism, was: What was the intention of the company and the Bank in relation to the transactions which are claimed constituted an assignment? If the intention was to assign then there was an assignment. He found that there was such an intention, and he stated that under the rule laid down in McIntyre v. Hauser, the passage of title took place.

The rule laid down in McIntyre v. Hauser, 131 Cal. 11, is:

> "In order to constitute an equitable assignment of a debt, no express words to that effect are necessary, if from the entire transaction it clearly appears that the intention of the parties was to pass title to the chose in action, then an assignment would have been held to have taken place."

This certainly does not hold that a *mere intent,* without its execution is sufficient.

It is hard to understand what appellants mean by "surrender of control".

They seem to think that there was no surrender of control because no notice was given to the Board of Public Works and other city officials; because the order was not accepted by the Auditor; because there was no statement in the order of a loan, or of a consideration or of an assignment; because no power of attorney was given to the Bank.

None of these things were necessary. When the whole transaction shows that it was the intention of the parties that *title* to the money due was *transferred* by the company to the Bank, and that the company was no longer in a position to *rightfully demand* the payment of that money to it, then there was a surrender of control.

Surrender of control relates to the *intention* to divest oneself of one's rights.

It relates to the *intention* accompanying a transfer and not to the *means* of carrying a transfer into effect.

It takes place if the rights conferred upon the assignee are not revocable. When the *locus poenitentiae* does not remain in the assignor, control has been surrendered.

> "No particular mode or form is necessary to effect a valid assignment. The assignment *need not be in writing,* and if in writing it may be in the form of an agreement or *order,* or in the form of any *other instrument* which the *parties themselves* may use for the purpose." (Italics ours.)
>
> 4 Cyc., 37.

> "An assignment may be inferred from the conduct of the parties."
>
> 4 Cyc., p. 43.

No notice of an assignment need be given.

> Vol. II, Am. & Eng. Enc. Law, 1076.

To negative the proposition that an intention to assign existed, appellants lay stress upon a former transaction between the same parties relating to a similar loan, when an order in the same language was used.

They say that although such an order was given to the Bank, still the money was paid by the Treasurer, not to the Bank, but to the secretary of the company, and that it was paid without the presence even of any representative of the Bank.

We have just shown these statements are wholly unsupported.

Appellants state, page 33 of brief, "On the contrary, also, the testimony of the cashier of the bank who made the loan shows that he fully understood that this was the only effect the notice had:" i. e., that the Bank was the agent of the construction company to receive the warrants.

In the first place, the cashier did not make the loan, it was made by the president of the Bank (p. 139 Tr..); and, in the second place, appellants, from the portion of the testimony quoted, omit a material part.

An examination of the cashier's testimony on page 253 of the transcript, and especially the cross-examination (conducted by appellants), shows that the cashier was not testifying about his understanding of the *legal effect* of the order on the Auditor, but was *explaining why he had suggested that Mr. Strong should endorse the warrants.*

We give a fuller extract:

> *"Mr. Strong signed the warrants at my suggestion and receipted for them at my suggestion.* The warrants were made out in the name of the Metropolis Construction Co.; and the Auditor, the only thing that he had was an order to deliver those orders to us, *although our name didn't appear on the warrants, only on the order; therefore Mr. Strong signed them"* (p. 253 Tr.), (see Findings, p. 160 Tr.). (Italics ours.)

The statement of the cashier that "the only thing that he (the Auditor) had was an *order to deliver* those orders to us" means the Auditor had no *papers* other than the order. It cannot mean, as appellants would have you believe, that the cashier was discussing the legal effect of the writing, and that he expressed his understanding that the order made the Bank the company's agent to receive the warrants and nothing more. On the contrary the cashier states that "The paper gave me authority to receive the money" (p. 253 Tr.).

If the Cashier had such an understanding, why would he and the President of the Bank require that the order be accepted by the Auditor before regarding it as collateral? The Referee finds that this was required when the order was first presented (pp. 99, 140 Tr.).

The mere fact that the secretary of the company receipted for the demands is immaterial.

This was done at the request of the Bank's cashier (p. 253 Tr.), (Findings, p. 160 Tr.).

It does not follow that because the company's agent receipted for the demands, his receipt was necessary in order to get the money from the treasury.

The Referee finds (p. 144 Tr.), that all demands of this kind

> "are received by the Auditor and by him *delivered to the person shown to be entitled thereto;* who takes the same to the City Treasurer,

> there receiving the cash and leaving the demand, after signing his name on the back thereof, under the words 'Received Payment' printed upon the demand." (Italics ours.)

This finding is supported by the testimony of Lewis on page 250 of the transcript.

There is no evidence whatever, nor can there be an inference, that the company was required to endorse its name on the demand. As a matter of fact there is no evidence that its name was endorsed on the demand for the third payment. The evidence merely shows that the name "L. F. STRONG" was endorsed upon it.

The evidence discloses that the demand was delivered to the cashier of the Bank (Finding, p. 144 Tr., Testimony, p. 252 Tr.).

The cashier testified that the Auditor required that he be identified before he could get the warrants and that he had some one from the Treasurer's office to identify him, and that the president and secretary of the company were with him at the time (p. 252 Tr.).

If, as appellants say, the company could have demanded the warrants from the Auditor, why did not its officers get them without the identification of the cashier? Apparently the Auditor would not even accept the cashier's identification by them.

We may safely conclude that the Auditor determines who is entitled to the demand, and that the

Treasurer will pay it to whomsoever presents it and that he merely requires the receipt of the latter.

If a demand, after auditing, bears any resemblance to a bank check, it resembles a check *payable to bearer.*

Appellants state that the Bank was merely the agent to receive the warrants and that its power would be extinguished on receipt thereof: that it could not get the money from the City Treasurer without the signature of the construction company: that the words of the order on the Auditor limited its power to receive the warrants from the Auditor.

We insist that the words the Bank "is authorized and empowered to *draw* the warrants" mean that the Bank is authorized to *receive payment* of the money, and that the Referee's opinion to this effect (p. 171 Tr.) is correct.

We have just shown that it does not appear that the Treasurer would require the receipt of any person except the one receiving the money, and that the Bank could collect from the Treasurer by merely presenting the demand and giving its receipt.

If the Treasurer required further evidence of the Bank's authority before honoring the demand, the Bank could leave with him its copy of the order on the Auditor.

If the Treasurer still refused to honor the demand the Bank could compel endorsement by the com-

pany, or it could sue the Treasurer and get a judgment against him.

Scheerer v. Edgar, 76 Cal. 569.

The Referee's conclusion (p. 162 Tr.) "that it was not the intention of the company to reserve any right for its own use and benefit, or at all, either to revoke the order on the Auditor or to collect the money", is not only fully supported by the transaction of December 6, 1910, but also by the statement of Mr. Emille made to the Bank's cashier at the time of the loan, that the order on the Auditor "was a complete assignment of the full amount of the three warrants" (Testimony of V. L. DeFigueiredo, p. 243 Tr.).

Again, Emille himself testified: "at the time I turned it (the order on the Auditor) over to the Bank, my understanding as to its nature was that it was an assignment for them to draw the money from the City Treasury" (p. 229 Tr.).

In the words of appellants (pp. 77, 78 Tr.) this was not "conflicting or contentious testimony", and is, therefore, entitled to great weight.

If the terms of a promise are in any respect ambiguous or uncertain, it must be interpreted in the sense in which the promisor believed, at the time of making it, that the promisee understood it.

Section 1649, Civil Code of California.

Appellants' support of their statement that "There is undisputed evidence tending strongly to show that the Bank really placed reliance upon

the mere promise of the construction company to pay out of a particular fund," is that the Bank gave no *notice* of its assignment until December 17, 1910.

They refer to no *undisputed* or any evidence.

Furthermore, there is none.

It is entirely immaterial when the Bank gave notice of the assignment, for no notice need be given of an assignment.

Appellants' statement (p. 33 Brief), "It was so arranged that the bank could not get the money from the City Treasurer without the signature of the construction company," is wholly unsupported.

On the contrary the Referee finds that:

> "The record does not show that the right to endorse this warrant was reserved by this company for any purpose whatsoever" (p. 170 Tr.).

Appellants' statement "The power granted was only with reference to the *warrants,* not to their proceeds. So *it would be exhausted when the agent* (Bank) *should receive the warrants in its hands,* and it could proceed no further without new authority from the principal," is misleading.

In considering the order on the Auditor, the Referee correctly finds that:

> "The words the bank is 'authorized and empowered to *draw* the warrants in favor of the Company' have a further significance than merely to receive the paper warrant, and in my

> opinion embraces the payment of the money to the Bank'' (p. 171 Tr.). (Italics ours.)

Appellants state, page 40 brief, that the demands had been *recalled* by the Board of Public Works from the office of the Board of Supervisors. Page 143 of the transcript discloses that the *President* of the Board of Public Works merely requested the Supervisors to withhold from *final passage* the demands of the Metropolis Construction Company, and that the demands were returned to the Board of Public Works where they remained for about two weeks.

There is no evidence that the demands were recalled. The Referee found (pp. 99, 140) that the resolution of the Board of Public Works for the payment of the fourth progress payment has not been revoked.

Appellants state, page 31 brief, "The warrants were not in existence at the time the notice in question was taken to the Auditor's office."

"Demands upon the Treasury" and "warrants" mean the same thing. An examination of the demand sued for in this action, on pages 213, 214, 215, 216 of the transcript shows that the demand on the treasury, or warrant, is merely a verified bill of the Metropolis Construction Company attached to a printed form containing numerous approval certificates.

This demand, or warrant, is dated December 5th, 1910, the day before the notice was given.

The Referee found (p. 144 Tr.):

> "That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors and the Mayor, *are received by the Auditor and by him delivered to the person shown to be entitled thereto; who takes the same to the City Treasury, there receiving the cash and leaving the demand,* after signing his name on the back thereof, under the words 'Received Payment' printed upon the demand." (Italics ours.)

This is supported by the evidence (p. 250 Tr.).

The bill of complaint (p. 11 Tr.) states that the Metropolis Construction Company presented its verified demand and that it was approved by the Board of Public Works on December 5th, 1910.

The Referee found (p. 140 Tr.):

> "That said warrant mentioned in said order" * * * "is the same demand that is sued for in this action."

The statements that "the claims or demands remained in the name of, *payable to,* THE CONSTRUCTION COMPANY", "the warrants were to be in the name of the construction company", "the bank (upon receipt of the warrant) would thereupon be in possession of a check payable to the construction company" are misleading.

As stated above the warrant or demand is merely a verified bill of the construction company attached to a printed form upon which numerous certificates of approval are endorsed.

No payee is mentioned anywhere in the demand. The city officials merely approve it as presented and then give it to the person entitled to it. They do not make out a check or recite to whom payment will be made.

A great part of the brief deals with surrender of control. The argument is based exclusively upon the wording of the order on the Auditor and the aforementioned statement of De Figueiredo. We have shown that the forced construction placed on the order amounts to merely a quibble; and that the statement of De Figueiredo, when given in full, shows no such intention as that contended for.

In re Cramond, 145 F. 966, is a case which throws some light on this subject. There we find the following quotation:

> "To make an equitable assignment, there should be such an actual or constructive appropriation of the subject-matter as to confer a *complete and present right* on the party meant to be provided for, even where the circumstance *does not admit of its immediate exercise.*" (Italics ours.)

This citation is taken from

Christmas v. Russell, 14 Wall. 69.

Referring to Christmas v. Russell, we find that the evidence relied on to support the alleged lien consisted of a series of letters, containing *promises* to pay a certain judgment, if affirmed, out of the proceeds of promissory note; or to send the note, if not sold, to the recipient of the letters, who was a

surety on an appeal bond. That was the evidence—Christmas did nothing beyond *promising* to see his surety protected. The note was later transferred by Christmas to his son. The last letter refers to the transfer, and winds up

> "In this I hope I have not lost sight of my purpose to protect you."

The Court held that the letters contained nothing which by construction or otherwise could have any effect as a transfer. At most they were only evidence of a promise to pay. The letters show on their face that Christmas retained full dominion over the note. Of course, there was no surrender of control. The opinion must be read in the light cast upon it by the facts of the case.

Appellants cite

> Commercial National Bank v. Portland, 60 P. 563; 37 Or. 33,

to the point that an order such as this, is not an equitable assignment, and prove their point in the usual way.

They omit to state that the order on the City Auditor provided that the warrants that were to be given to the alleged assignee were to be for amounts equal

> "to the value of the lumber furnished by the Fuel Company and used in making said improvements, now under way, to be evidenced by bills presented by said company and approved by me."

The company wanted a different order permitting delivery of warrants to it without any further act on part of Dill (the contractor), *but he refused to give such order.* The requirement that the contractor had to approve the bills, before amount due the fuel company could be determined, in this case, was fatal to the alleged assignment.

We quote the following from the opinion:

> "And assuming that in this respect the order is sufficient to constitute an equitable assignment the fatal objection remains that it did not vest in the fuel company a present right to the warrants, or authorize the city recorder to deliver them without the further approval of Dill. It is only upon the presentation of bills for lumber approved by Dill that the city recorder is authorized, under this order, to deliver warrants to the fuel company. The contract was not complete. Something remained to be done in the future by Dill before the right of the company to the warrants should become absolute. The city could not be compelled to deliver to it any warrants until the bills had been approved by Dill."

This case is therefore no authority supporting the point that an order directed to a City Recorder or Auditor to deliver warrants may not be an assignment, or that such order may be revoked.

In short, the order left with the recorder was simply a direction to him to draw warrants in favor of the Fuel Company *when* the contractor *approved* the *company's lumber bills.*

Hence, the dicta of the Court, that the person to whom the order was addressed was not the custo-

dian of the fund, are obiter. It is universally recognized that the assignee of the *means* of obtaining a fund is the assignee of the fund. Complainant, himself, has sued in this action for possession of a *paper demand.* Why? Because if he got the demand or the trustee got it for him, cashing it would be a mere matter of course.

But here we are not standing on the order alone, but on the whole transaction of December 6, 1910. The circumstances under which the loan was made, negative any other intent than that of an assignment. In

> Fourth Street National Bank v. Yardley, 165 U. S. 634,

Mr. Justice White reviews at great length *circumstances*—very similar to those of this case,—under which a check was given for a loan; and he concludes, that,

> "it could not be reasonably conceived that the loan would have been made without reference to, and assignment of, the fund from which alone the hope of immediate payment was to be reasonably expected."

In the course of his opinion the learned Chief Justice then said:

> "The transaction, therefore, was a proposition to borrow on the one hand, accompanied with the disclosure that security was necessary and tendering the security, and on the other hand an acceptance of such proposal and an advance made on the faith of it."

If we apply the reasoning of that case to this, there is no escape from the conclusion that the Bank is a bona fide assignee of the fund represented by the demand for said fourth progress payment; it cannot "reasonably be conceived" that the Bank loaned thirty thousand ($30,000.00) dollars "without reference to, and assignment of," the only fund out of which it could reasonably expect immediate payment.

The order on the Auditor is but one item of the whole transaction of December 6, 1910,—a means given by the company to the Bank to carry out the mutual understanding. When, from all the circumstances the *intent to transfer title* appears, that intent will prevail. *No writing* is necessary: *no notice* of the assignment is required to be given. These principles are fully supported by the following cases:

Civil Code of California, Sec. 1052;
Curtin v. Kowalski, 145 Cal. 431;
McIntire v. Hauser, 131 Cal. 14;
Smith v. Peck, 128 Cal. 530;
Lawrence etc. Bank v. Kowalsky, 105 Cal. 43;
Renton etc. Co. v. Monnier, 77 Cal. 457;
Spain v. Hamilton's Adm's, 1 Wall. 604;
4 Cyc., 7, 37, 43;
9 Cyc., 588.

It is quite immaterial whether the assignment is legal or equitable. In any case, the assignee will be protected. In

Mitchell v. Winslow, 17 Fed. Cases, p. 533,

Mr. Justice Story states the universal rule as follows:

> "It seems to me a clear result of all the authorities, that whenever the parties, by their contract, intended to create a positive lien or charge upon real or personal property, whether it is then *in esse* or not, it attaches in equity as a lien or charge upon the particular property, as soon as the assignor or contractor acquires a title thereto, against the latter, and all persons asserting a claim thereto, under him, either voluntarily or with notice, or in bankruptcy."

While, as appellants claim, "the proof required of an assignment or transfer is the same in law as in equity", we desire to call attention to the fact that in this State an assignment for security vests the legal title in the assignee.

> "An assignment of a policy of life insurance as security for advances made and to be made by the assignee, vests the legal title to the policy in him. The remaining interest of the assignor is the right to receive what remains of the proceeds of the policy after the advances made by the assignee have been satisfied. Until such satisfaction the assignee cannot be compelled to surrender the policy."
>
> Syllabus (correctly stating the law) in case of Gilman v. Curtis, 66 Cal. 116 (In Bank).

This has been followed in the case of

> Widaman v. Hubbard, 88 Fed. Rep., p. 812.

If, therefore, the facts of this case support the finding that the Bank has an assignment, then under the laws of California the legal title to the

fourth progress payment vested in the Bank, and surrender of control by the company followed as a matter of law.

In view of the law on this subject, as laid down by the courts, the conclusion of the Referee that

> "There was in fact a surrender of control, in that the company was not in a position to collect the demand itself, it having parted with the right to receive the warrant, nor was it in a position to revoke the order upon the Auditor, the same having been given for a valuable consideration, nor to do anything by which it could control for its own use and benefit the claim due from the city. I believe that the control intended by the doctrine of equitable assignment is the retention by the assignor of some right over the fund which he is in a position to enforce, either for his own benefit or for the benefit of another" (p. 170 Tr.),

is a correct statement of principles. The above conclusion finds ample support in the evidence,—in fact is the only conclusion that can be drawn from the facts of the transaction.

In the facts of the case we find no *revocable promise,* no *revocable understanding,* but something actually *done* to carry out an understanding, upon the *doing* of which a *present valuable consideration* passed from the Bank to the company.

To assume that upon the facts of this case the order on the Auditor was *revocable* by the company, or that the *rights* acquired by the Bank in the transaction were *revocable* by the company, would be to fly in the face of reason. If not re-

vocable by the company, they of course were not revocable by anyone claiming through or under the company.

The facts relating to the transaction of December 6, 1910, and upon which the Bank bases its claim of assignment are set forth in the testimony on pages 221 to 249 of the transcript, and are reviewed in the opening pages of this brief. There is no dispute as to these facts. They were found by the Referee in his report of October 14, 1911 (pp. 93 to 101).

This report was agreeable to all parties and was confirmed by Judge De Haven on December 12, 1911 (p. 183 Tr.).

On the final hearing, appellants did not introduce any evidence, except as follows:

Counsel for complainant offered in evidence the report of the Referee of October 14, 1911, the memorandum opinion by Judge De Haven, dated December 12, 1911, and the "order approving report of Referee granting injunction, etc." made December 13, 1911. He then rested (pp. 263, 264 Tr.).

Thereafter on July 16, 1912, the Referee again reported the same facts as to the transaction of December 6, 1910 (pp. 134 to 143 Tr.).

No exception to any of these findings of facts was ever made, except as to the finding

> "that when Chris Emille turned over said order to the bank he understood that it was an

> assignment for the bank to draw the money from the treasury, that he intended that said order should be a complete assignment of the full amount of the three warrants set forth therein" (p. 179 Tr.).

This finding appears in both reports, but the exception to it was taken only in the exceptions to the report of July 12, 1912.

The appellants are inconsistent in attacking this finding, for it is one of the findings which, in their twelfth exception (p. 177 Tr. and p. 180 Tr.), they say "are now, and were then, undisputed facts and not findings upon any conflicting or contentious testimony."

The findings of fact relating to the transaction of December 6, 1912, being undisputed, with the one doubtful exception above noted, appellants deny that they constituted an assignment, by laying stress upon the wording of the order to the Auditor authorizing the Bank to draw the warrants. Because it does not in terms express a transfer they insist it merely creates an agency.

It is wholly immaterial that there is no writing in terms conveying the warrants to the Bank.

The relation of the parties, the circumstances surrounding them, what was done and said, all form a *single transaction,* from which the intention is to be deducted.

Every requirement of the Civil Code of California relating to the subject of assignment is present in the transaction under discussion.

To avoid unnecessary length in this brief we respectfully refer the Court to pages 167 and 168 of the transcript, where the code sections are fully set forth by the Referee.

It is, therefore, respectfully submitted, that the Bank had a good and valid assignment of the fourth progress payment on December 6, 1910.

REPLY TO APPELLANTS' POINT THREE.

It appears from the bill of complaint of appellant Welles that this claim was allowed and approved by the Referee in bankruptcy as a secured claim. The trustee, the other appellant, represents the general creditors under the bankruptcy law. Hence, if the Bank's claim of assignment is well founded, this question of priority is one that affects the rights of Welles and the Bank, only.

Section 1184, Code of Civil Procedure of the State of California, set forth at pages 44 and 45 of appellants' brief, must determine the question of priority between Welles and the Bank. That this section entered into and became part of the contract between the city and the company is, as appellants contend, beyond all doubt.

In the interpretation of this statute, the only point of difference between the parties arises over the word "due" in the following portion: "* * * and he (the person who contracted with the contractor) shall withhold from his contractor * * *

sufficient *money due,* or that may become due to such contractor", etc. (italics ours).

Appellee bases its rights upon the ordinary meaning of the word *due,* as demanded by the text and as given to it by the Supreme Court of this State in the case of The Newport Wharf and Lumber Company v. Drew, 125 Cal. 585. The appellants, on the other hand, insist on reading the word *due* out of the section and substituting therefor the word *matured,* and on reading the word *money* out of the statute and substituting therefor the word *demand* or *warrant* (appellants' brief, p. 45).

This substitution of terms does not, however, help appellants, as we shall show that the facts and law in this case coincide exactly with the facts and law in the case of The Newport Wharf and Lumber Company v. Drew, supra, and that the points now made by appellants are involved and decided in that case.

Appellants' contention seems to be this: in order that money shall be due, it is necessary that the demand be in such shape that the holder thereof may go to the City Treasurer and demand *immediate payment.* This, we submit, is not the case.

Welles' right to priority depends entirely upon the "notices to withhold" which are provided for by Section 1184 of the Code of Civil Procedure of California.

A "notice to withhold" is held to be in the nature of a *garnishment.*

Newport Co. v. Drew, 125 Cal. 585, at page 589;

Bates v. Santa Barbara Co., 90 Cal. 543, at page 546;

Bianchi v. Hughes, 124 Cal. 24, at page 27;

Butler v. Ng Chung, 160 Cal. 435, at page 439.

It is operative only as to moneys then *due* or that may later *become due* to the contractor.

Butler v. Ng Chung, 160 Cal. 435, 439.

As to the moneys theretofore due and assigned by the contractor prior to the giving of such a notice, it is inoperative for the simple reason that such moneys are no longer *due* to the *contractor* but to the *assignee.*

It is true that a contractor cannot prevent the effect of a "withholding notice" as to any payments that may become due after such a notice is given by assigning his rights to such payments before they are due.

If therefore the fourth progress payment was due to the company on or before December 6, 1910, there can be no question but that it could assign it and its assignee would take title superior to any claims subsequently made by subcontractors by virtue of withholding notices under Section 1184 of the Code of Civil Procedure of California.

When money becomes due under a contract of this kind, is a matter to be determined by the terms of the contract and the provisions of the Charter of the City and County of San Francisco. The following sections are to be found in Chapter I of Article VI of the said Charter:

> "Sec. 22. The work in this Article provided for must be done under the direction and to the satisfaction of the Board of Public Works; and the materials used must be in accordance with the specifications and be to the satisfaction of said Board, and all contracts provided for in this Article must contain a provision to that effect, * * *"
>
> "Sec. 11. Said Board (of Public Works) shall appoint a Civil Engineer * * * who shall be designated the City Engineer. * * * He shall perform all civil engineering and surveying in the prosecution of the public works and improvements done under the direction and supervision of said Board, and shall certify to the progress and completion of the same, * * *"
>
> (Only the portions deemed material are printed.)

To determine when the money became *due* from the city to the contractor, we must bear in mind that the indebtedness of the city is a different matter from the demands afterwards made out therefor; and that the Charter provisions governing *approval* and auditing of *demands* are not to be given any weight as determining when the money *became due.* They constitute the *manner of payment* merely.

This may be illustrated by reference to the following Charter provisions:

(Art. IV, Chap. II, Sec. 7.)

> "Every demand * * * must * * * be presented to the Auditor, who shall satisfy himself whether the money is *legally due,* etc." (Italics ours.)

Also (same section):

> "Every *demand* * * * shall * * * show: * * * 3. The fiscal year in which the *indebtedness was incurred.*" (Italics ours.)

It seems clear that no *indebtedness* could be incurred unless money was *due,* and that the indebtedness must *precede* and *give rise* to the *demand.*

The contract under consideration, and the Charter, require that the work "shall be done under the *direction* and to the *satisfaction* of the Board of Public Works."

The contract provides, also, "progressive payments for said work to be made, as provided for in the specifications therefor."

The specifications provide:

> "In order to assist the contractor to prosecute the work advantageously, the City Engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated in the herein proposed work by the contractor.
>
> * * * * * * *
>
> "*Upon each such estimate being made,* the City and County of San Francisco *will pay or cause to be paid* to the contractor in the manner pro-

> vided by law, an amount equal to 75 per cent of said City Engineer's estimate" (pp. 135, 136 Tr.) (Italics ours.)

Hence, the fourth progress payments became due to the contractor upon the *estimates* being made by the Engineer and the Board of Works signifying their *satisfaction with the work.*

The fourth progress payment estimate was made by the City Engineer on December 3, 1910. This estimate was approved by the Board of Public Works on December 5, 1910. On the same day, the Board of Public Works by resolution, authorized a fourth progressive payment to said company, and a "Demand on the Treasury" in favor of the company for said payment was approved by the Board of Public Works.

On page 48 of their brief, appellants quote portions of the opinion from the case of The Newport Co. v. Drew, 125 Cal. pp. 589 and 590. But these excerpts are cut too short by appellants, and fail to convey the meaning of the Court. We here present more fully the portions of the opinion from which appellants quote. On page 589 the Court say:

> "The contractor cannot prevent the effect of this notice as to any payments that may mature after it is given, but its effect on payments that have *matured, before it is given, but which have not been made,* is to be determined by the rights of the contractor in reference to them. If he is still entitled to demand their payment from the owner, such payment

is intercepted by the notice, but if he has already assigned them to a third party the notice will be inoperative to prevent their payment to such party. (Code Civ. Proc. Sec. 1184; Bates v. Santa Barbara County, 90 Cal. 543; First National Bank v. Perris Irr. District, 107 Cal. 55)." (Italics ours.)

On pages 589 and 590 the Court say:

"The provision in the contract for the payment of ninety per cent of the value of the materials used and labor performed 'as the work progresses', with the condition that, before any payment should be made, the superintendent of construction should, not oftener than once a month, furnish an estimate of such labor and materials, with the amount due thereon, rendered such installment of the contract price due and payable immediately upon the *acceptance of the work* by the Trustees. The contract provided that the work should be done to the *satisfaction* of the board of trustees, and the contractors were not entitled to demand payment of the amount of the estimate until after such approval and acceptance. Their approval of the estimate and direction for its payment implied their satisfaction with the work without any formal declaration to that effect. Upon such approval and direction the *obligation* of the state which had been created in favor of the contractors by the trustees *became complete,* and the right of the contractors to *immediate payment became vested* in them and was subject to their *disposition.*" (Italics ours.)

On page 592, is the following:

"Upon their (trustees) acceptance of the work the contractor became immediately entitled to the payment of the amount of the estimate."

Hence we conclude that the *estimate* and *satisfaction with the work* were the elements which fixed the *obligation* to pay.

Hence, upon the completion, *estimate* and *acceptance* of the *work,* or any *progressive part thereof,* the *contract price,* or *proper portion thereof,* becomes immediately *due* and payable; thereafter, the *approval* of the *demand* for such price, or part thereof, is a plain *ministerial duty.*

The demand is nothing more than a bill presented to the city for the amount of the debt incurred (Art. III, Chap. III, Sec. 13), the form of which is prescribed by the Charter.

The distinction between the debt and the demand is further illustrated by the Newport case in this: The Court decide that upon the *estimate* of the superintendent and *acceptance* of the work by the trustees, the right to *immediate payment* vested in the contractors; but immediate payment could not be obtained. Reference to the Political Code of California then in force will show that the Controller *could not draw his warrant, until* the State Board of Examiners had *approved* the demand.

> "Sec. 672. CONTROLLER NOT TO DRAW WARRANT FOR CLAIMS NOT AUDITED BY EXAMINERS. The Controller must not draw his warrant for any claim unless it has been approved by the board * * *"
>
> "Sec. 433. It is the duty of the Controller: * * * 10. To audit all claims against the state in cases where there are sufficient provisions of law for the payment thereof. * * *

> 17. To draw warrants on the treasury for the payment of moneys directed by law to be paid out of the treasury; * * *"

All this required time and precluded any idea of *actual, immediate payment,* in point of fact. These steps may be regarded, however, as successive acts in the process of payment. The following language is pertinent here:

> "The provision in the contract for the payment of the *contract price* in *Controller's warrants* on the State Treasurer *did not affect* this power of disposition, or *right to immediate payment,* or suspend its exercise until such warrants should be obtained. The failure or neglect to obtain a warrant *immediately* upon the *approval* of the estimates would have no greater effect than a similar failure on the part of the contractor, in case of an ordinary building contract, to obtain a *check* from the owner *immediately* upon receiving the architect's certificate that the installment is payable." (Italics ours.)
>
> The Newport Co. v. Drew, 125 Cal. 590.

The Board of Examiners act in the same capacity on claims against the state as do our Board of Supervisors on claims against the city, and the Controller acts in the same capacity as our Auditor. Yet, in the Newport case the Court decide that the approval of the Board of Examiners was not required to make the demand due. This was necessarily decided, for the reason that the appellant strenuously contended that no money was *due* to the contractors *until the warrants were issued* (see briefs on file in State Library).

The *measure* and *approval* of the work *create* the indebtedness and *fix* the obligation of the city to pay; the approval of the demand authorizes the Treasurer to disburse the money.

Under the law, therefore, there was no *part* of the fund upon which the notice of Welles could operate. In the case of

> First National Bank v. Perris Irrigation District, 107 Cal. 62,

the Court say:

> "If the contractor, previous to the giving of the notice (under said Sec. 1184) has transferred to another, who takes the assignment for value and without notice of the latent equities of the materialmen, the amount then actually due and payable on the contract, there is nothing either due or to become due to him, and there is no fund on which the notice can operate."

In this case the Board of Public Works occupies the same position as the trustees, and the City Engineer the same position as the superintendent of construction, in the Newport case. It is to be noted that the trustees in the Newport case had the right to *approve payments* under that contract and they were also the parties to be *satisfied* with the *work.* In them, under the law and the contract, were centered the two functions of *accepting the work* and *approving the payments therefor.* In the case at bar the law and the contract require the work to be done to the *satisfaction* of the *Board of Public*

Works,—not to the satisfaction of the *Board of Supervisors.* When the Board of Public Works *accepts the work,* and declares its satisfaction therewith by resolution, *then* the Board of Supervisors approves *payment* of the demand.

To understand the decision in the Newport case, it is essential to keep in mind the *dual* capacity in which the trustees acted. The distinction between the trustees' approval of the *work* and their approval of the *payments* is constantly referred to throughout the decision. When, by any act, they signified their *approval of the work,* the *right of the contractors* to immediate payment *became vested* in them.

We also call particular attention to the following extract from the case of the Newport Co. v. Drew, Supra, p. 592:

> "By the terms of the contract the work was to be done to the *satisfaction* of the board of trustees, as well as that of the superintendent of construction, and the *approval* by the *trustees* of the several *estimates* when presented operated as an acceptance of the work done on the contract prior to the dates of such approval. Their function, however, was merely to declare their approval or disapproval of the work and to determine its conformity with the terms of the contract, while the function of fixing the amount of the payment, both under the statute and by the terms of the contract, devolved upon Goff. *Upon their acceptance of the work* the contractor became *immediately entitled* to the *payment* of the amount of the *estimate.*" (Italics ours.)

The statement of appellants that the approval of the demand by the Board of Supervisors was necessary to make the money due, is not supported by the Charter. The Board of Public Works is the body under the Charter to *make the contract* on behalf of the city, and to *fix the city's obligations to pay money* thereunder.

The auditing and approval by the several persons and bodies thereafter are only the prescribed steps in the liquidation of the debt. If money is due from a private corporation, it does not follow that the creditor can go into its office and compel immediate payment, if the laws of the corporation provide for auditing. The principle is the same here. The auditing and approval are ministerial duties, except in so far as they may act as checks upon an unlawful expenditure of funds by the departments.

Sec. 19 (of Article II, Chapter I) provides:

> "Except as provided in Chapter III of Article III of this Charter, all demands payable out of the treasury must, before they can be approved by the Auditor or paid by the Treasurer, be first approved by the Board of Supervisors. All demands for more than two hundred dollars shall be presented to the Mayor for his approval, in the manner hereinbefore provided for the passage of bills or resolutions. All resolutions directing the payment of money other than salaries or wages, when the amount exceeds five hundred dollars, shall be published for five successive days (Sundays and legal holidays excepted) in the official newspaper."

The object of the Charter, by requiring different formalities for different amounts, is very apparent. It is not, as appellants contend, to give materialmen and laborers a chance to file liens, because, in the first place, they cannot file claims of lien against public works; and because, in the second place, they could, under Section 1184 of the Code of Civil Procedure, give their notices to withhold *before* they started to furnish material or perform their labor. The intent of the Charter is to give the citizens a chance to protest in case it should appear that the departments are unlawfully expending the public money.

An opinion of Hon. Franklin K. Lane, written while he was our City Attorney, throws a clear light upon the functions of the Supervisors in these matters:

> "The duty imposed upon the Board of Supervisors of approving all demands upon the funds set aside for departments which are given exclusive control over their appropriations is of purely ministerial character, except in so far as it acts as a check upon such departments against the expenditure of more than its appropriation permits, or protects the city and county against expenditures of an unlawful character. The Board of Supervisors, at the beginning of each fiscal year, must set aside appropriations for the departments named, and at such time may, by the appropriations so made, limit and control the expenditure of such departments for such fiscal year. But, after such appropriation has been made, responsibility for its expenditure rests entirely on the

> department to which it is allotted. The legislative department provides the funds, the administrative departments expend them, and each is to be held responsible within its own province. The administrative departments are made responsible for the manner in which the moneys so appropriated are used." (Opinions of ex-City Attorney Franklin K. Lane [1899-1902], pp. 180, 182—Charter of San Francisco, annotated by W. S. Church, p. 22.)

The contention of appellants that payments *might be withheld* by the city is immaterial in this suit, as appellants do not claim under the city, but under the Metropolis Construction Company.

In conclusion, we desire to state that Welles, in his bill of complaint (p. 10 Tr.), alleges that this fourth progress payment became due on December 5, 1910, on estimate by the City Engineer and approval by the Board of Public Works, by its resolution duly made and adopted.

For all of which reasons the decree herein should be affirmed.

San Francisco, California,
October 27, 1913.

Respectfully submitted,

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No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES, and JOHN DANIEL, Trustee of Metropolis Construction Company (a corporation), Bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),
Appellee.

APPELLANTS' REPLY BRIEF.

I.

Off the Record.

Counsel seeks to create an impression that one of the reasons urged by appellant in the trial court, against the validity of the bank's claim to an assignment, was really abandoned before the referee by quoting, from a typewritten brief of counsel for appellant Welles, a statement made by counsel in argument.

Such remarks are *off the record* and not before the court. If the court can consider such matter, it must then, also, consider other matters off the record, because, a statement of counsel, particularly one in *argument,* only must be considered (if deemed of any effect at all) in the light of its environment or surrounding circumstances. At all events the words in question were not participated in by appellant John Daniel, who appeared by separate counsel.

POINT RAISED AND DECIDED.

Notwithstanding the remarks of counsel for Mr. Welles, quoted from the typewritten argument filed before the referee, to the effect that counsel did not contend that the demand could not be assigned without consent, the contention was *theretofore,* and, also, *thereafter* presented and urged by counsel both for Welles and the appellant, John Daniel, trustee, etc.; and the remarks were used merely to call sharp attention to the argument *then* under discussion by eliminating, *for the time,* all other thoughts from discussion—but were not made with any idea of abandonment of such other thoughts.

THE CONTENTION WAS NEVER ABANDONED.

This legal objection to the existence of a valid assignment was raised on oral argument and in the briefs filed prior to February 15th and presented orally to the referee. Proof of this is con-

tained in a statement of opposing counsel in a brief dated February 2, 1913, as follows:

> "*To defeat the intention of the parties, and the inevitable conclusion forced by the findings of fact, the complainant contends that the demand and payment could not be assigned without the consent of the Board of Public Works, which consent was not obtained,* and that in a former transaction of like kind between the same parties the Company reserved the right to endorse the demand."

Moreover, the referee frankly and at a time before either of these briefs were filed, disagreed with counsel for Welles who had presented the contention as a reason for holding that the bank had no legal or valid assignment, taking the view finally expressed by him in his final report as a reason for upholding the legality and validity of the assignment, namely; that the objection could be raised only by the city.

It was then that counsel, realizing that it was useless and unnecessary that he should waste time or argument on a legal position once ruled adversely to him by continually re-asserting it, so stating to the referee, and desiring for the sake of brevity to confine his arguments to points not ruled upon, made the remark in argument to which appellee attempts now to attach importance.

Therefore the language quoted, and made much of, by appellee, was only used by appellant's counsel in arguing another and *different* legal position,

and merely for emphasis *in order to direct the referee's attention* to the exact point under discussion by eliminating, *for the time,* the point already ruled upon by the referee.

Thereafter, on the referee's first and second reports the decisions were *in favor* of Welles.

Thereafter, on the hearings upon the third and final reference to the referee, however, the objection was again presented and urged and, to the referee, counsel presented the position and stated that he desired to reserve the point notwithstanding the referee's decided views concerning the law governing.

These matters are outside the record as, also, of course, is the statement of counsel referred to in appellee's brief, and which in the light of the circumstances under which it was made, appears to have been merely argumentative—not to have been an abandonment of the contention that the failure to obtain consent was one of the reasons why the court could not find a legal or valid assignment in favor of the bank.

Some proof tending to show the correctness of these statements, *off the record,* is found in the record, in that the record shows that during the proceedings on the final hearing before the referee, counsel for Welles did make an oral argument and urged certain objections (not appearing) *which he did not waive.*

"Mr. Frost. *(After argument)* Without waiving my objections, I will make this stipulation," etc. (Tr. p. 266).

But, that the discussion then undoubtedly involved this very question is shown by the fact that the record shows that counsel for the bank, *immediately thereafter,* used the "stipulation" given by counsel for Welles to introduce in evidence the full text of that portion of the contract specifications containing the prohibition against assignment without consent, and which could have no other possible bearing on the case than with reference to the position in question and the mere introduction of which by the bank at this time is sufficient evidence that the subject was one of the issues then involved in the case (Tr. pp. 268, 269).

And that this general subject of "consent" was then before the court is also proven by the fact that on the said hearing the bank's counsel asked and obtained a stipulation to the effect that *Welles* had not obtained *formal* consent, although acting with the knowledge of the board, etc. (Tr. p. 271).

Also, further proof that the contention was never abandoned at all is found in the fact that the referee did not so regard it, but treated it as a legal proposition for first consideration on the two main questions presented in his report (Tr. p. 152) and that he considered and decided it in his report (Tr. p. 137, p. 152) finally concluding after thrusting the position aside (Tr. p. 171) and as his

conclusion on that subject that the fourth progressive payment "was on the 6th day of December, 1910, assigned" etc.

Counsel is not surprised at what seems a rather *sophisticated* attempt by appellee's counsel, to prevent the consideration of a legal argument fatal to their case. But the attempt is not well taken.

(B)

EXCEPTIONS TO REPORT.

Exceptions to the referee's conclusions holding the bank to have received a legal or valid or any assignment on December 6th, or any *right,* were made.

The conclusions of the referee are (Tr. pp. 171, 172)

> "That the fourth progressive payment in the sum of $6830.85 was on the 6th day of December, 1910, assigned by the company to the bank as security for the repayment of loans amounting to $35,000 made by the bank to the company, and that said assignment and the right of the bank to receive the moneys due upon said fourth progressive payment are not affected by the notice to withold made by complainant."

In the beginning of his decision the referee states the questions arising in two paragraphs as follows (Tr. p. 152):

> "There are two main questions presented. First, whether the fourth progressive pay-

ment in question was due to the company and was the proper subject of an assignment when the alleged assignment to the bank was made.

Second, does the evidence show that an assignment took place."

And under these two questions he considered and disposed of all the legal arguments and reasons urged by counsel including the one about consent, and many others!

Following on page 171 of the transcript is his answer or conclusion as to these questions as herein above quoted.

What is in between, *including what is said about "consent" under the contract,* is by way of argument and reasoning leading up to his final conclusion, and might be left out without detracting from the legal sufficiency of the report.

In this part the paragraphs are not segregated or numbered.

It shows, however, that the referee heard and decided the legal position in question, in the manner we have indicated.

In the trial court the hearing took the form as presented by the referee.

In presenting exceptions counsel properly and naturally followed the form of presentation adopted by the referee and raised the question of the legality, validity and sufficiency of the referee's conclusions in every available way.

Appellants excepted to the referee's report in that the referee concluded that the bank received a legal title to the fourth progressive payment (Sixth Exception. Tr. p. 175).

Also because the referee had erroneously concluded that the payment in question was assigned to the bank (Seventh Exception).

Also on the ground that the transactions of December sixth conferred upon the bank, at most, merely a right to receive the warrant, and that the referee should have so concluded (Eighth Exception. Tr. p. 176).

Also upon the ground that the referee should have concluded that any right which the bank may have acquired was subject to the rights of the trustee in bankruptcy (Eleventh Exception. Tr. p. 177).

Also to the findings of the referee that the Construction Company did assign the fourth progressive payment to the bank and to the conclusion of law that the authorization to the auditor constituted a legal or equitable assignment (Exceptions 2 and 3. Tr. pp. 180 and 181).

If the trial court were of the opinion that failure of the bank to obtain consent operated to prevent a legal or valid assignment, or any right passing to the bank, it must have reversed the referee's conclusions and held each of these exceptions well taken!

This is a sufficient test.

It is difficult to conceive how appellants could have more adequately excepted to the conclusions of the referee.

(C)

SPECIFICATIONS OF ERROR.

Concerning what was heard and determined by Judge Dietrich, we have at least, this record:

The conclusions of the referee were before him, (with the reasons therefor in an opinion dealing with every phase of the case) and the exceptions to the referee's conclusions were before him.

"Upon consideration", as the court himself said, (Tr. p. 183) of these, the report was approved and it is decreed "That the exceptions, and each of them * * * are overruled, and the said report be * * * in all respect confirmed" (Tr. p. 187).

And to this decision of the court, specifications of error fully covering the referee's conclusions (his report and exceptions thereto) were made, as follows: The action of the court in overruling each of appellants' exceptions to the report of the referee was specified as error (Exception 1, Tr. p. 192 and p. 200).

More than this, the conclusions of the referee were also specifically covered by the following specifications:

A specification that the court erred in not holding that the fourth progressive payment was not assigned (Specification 6, Tr. p. 194, and p. 201).

Also that the court erred in not holding that any right which the bank may have acquired was subject to the rights of the trustee in bankruptcy (Specification 10, Tr. p. 194 and p. 201).

Also that the court erred in holding that the bank had any right whatever, paramount to the right of complainant Welles, to the warrant or its proceeds (Specifications 16, Tr. p. 196 and p. 203).

Also that the court erred in making a decree that the bank had a good and valid assignment to the fourth progressive payment and the demand therefor and is the owner thereof, etc. (Specification 17, Tr. p. 196 and p. 203).

Also that the court erred in making a decree that the defendant bank have and recover from the trustee the demand for said fourth progressive payment in the sum of six thousand eight hundred thirty dollars and eighty-five cents (Specification 19, Tr. p. 196 and p. 204).

Thus bringing before *this court* what had been heard and decided by the trial court, to wit: the report of the referee, his findings and conclusions, and the action and decision of the lower court thereon.

It is difficult to conceive how the errors complained of by the appellants could have been raised

either by exceptions or specifications of error any more effectively, as a matter of law, than they are in the foregoing.

That these exceptions and specifications were intended to cover the point in question is shown by the fact that the question of equitable assignment and of failure to obtain "control" is raised *separately* by the Fifth, Thirteenth and Fourteenth Exceptions. Again, *separately,* by the Fourth, Twelfth, Thirteenth, Fourteenth and Fifteenth Specifications of Error; *which are distinct and separate from the exceptions and specifications hereinabove relied on to bring up the question of validity on the ground of failure to obtain "consent"!* The word *"consent"* itself is not used *because the Referee himself stated the case and his conclusions* (embracing the point) *without using that word.*

The position has been shown to have been expressly and positively presented to the referee, decided by him in his report and conclusions, and fully excepted to by appellants; to have been necessarily before him, to have been decided by him, to have been decided by the decree overruling appellants' exceptions and approving the referee's report and conclusions, and brought here by proper specifications of error.

That these are matters necessarily to be heard and determined by this court, is considered, therefore, to have been proved *by the record!*

II.

"Collecting the Money"—A Correction.

An error in quoting from the transcript is seized upon by appellee in the brief, at page 25 and made much of. For this we find no fault in them.

Appellants would like to point out, however, that the error is inconsequential because the conclusion sought to be drawn from it by appellees, to wit: that there is no evidence that Mr. Strong collected the money, is not justified. It is not justified because the evidence shows that L. F. Strong was the company's assistant secretary or agent and for the following reasons. The testimony referred to is of Strong himself and is as follows:

> "At that meeting" (referring to the time when the loan was made), "I was acting in the capacity of assistant secretary. At that time and subsequently during the year 1910, I was doing the duties of *secretary* of the Metropolis Construction Company. Mrs. Emille, the regular secretary, was not active during the year 1910 as secretary of the company. I performed the actual duties of secretary of the Metropolis Construction Company subsequent to January first, 1910, and during the year 1910" (Tr. pp. 231 and 232).

An oath in the main body of the demand declares Strong to be the "duly authorized agent" of the Construction Company (Tr. p. 214).

> "L. F. Strong, being first duly sworn, deposes and says: that he is a duly authorized agent of the party, requested to perform the work mentioned in the foregoing demand; * * *".

It made no difference, therefore, whether the cashier of the bank was present or not, because the Construction Company and L. F. Strong, its *duly authorized agent,* only, could have received the money for the reason that the demand was payable on its face to the company only. If Mr. de Figueiredo had gone there alone he *could not* have obtained it. If Mr. Strong had gone there alone he *could* have obtained it. The presence of de Figueiredo, or his absence, had nothing more to do with the payment of the money than did the presence of a messenger boy, because it was the signature of L. F. Strong, the *"duly authorized agent"* of the Construction Company that the treasurer had to have.

Counsel in his brief (p. 31) says:

> "It does not follow that because the company's agent receipted for the demands his receipt was necessary in order to get the money from the treasury."

But it was necessary in this case at least because the company or its authorized agent (and Strong was its "authorized agent" on the face of the demand) was the only "person shown to be entitled" according to the finding of the referee (Tr. p. 144) quoted by counsel for appellee (brief, p. 31).

This being so, *who had immediate control* of the money coming from the City Treasurer on the

Fourth Progress payments? The Construction Company or the bank?

The Construction Company!

III.

"A Correct Inference"—A Refutation.

In several places in appellee's brief it is alleged that the arguments of counsel are misleading. We will notice one such. On pages 10-12 appellee argues that the statement of appellant to the effect (our brief, p. 20) that the court evidently considered the bank should have an opportunity to produce "further proof on final hearing" as a reason for sending the case back to the referee a third time is erroneous.

The record, however, shows this inference to be quite correct, for the reason that on the hearing before the referee all the testimony taken upon the former hearing was offered and admitted by *stipulation* (Tr. p. 267) and the referee then made the announcement,

> "The referee.—*Counsel for the Portuguese-American Bank* may introduce such further evidence *upon issues raised by answer to the bill* * * *" (Tr. p. 267).

Followed by the actual introduction by counsel for that bank (Tr. p. 268) of some documentary evidence.

Which shows, apparently, that the purpose of the order *was* to give the bank opportunity to introduce testimony under its answer, that the referee so construed it, and that counsel for the bank not only *so* understood it, but *so* used it.

IV.

The Merits—A Summary.

A.

ANOTHER REFUTATION.

Counsel states (p. 17) that appellant's contention that the ruling of Judge DeHaven subsequently became the law of the case was submitted to Judge DeHaven and by him overruled. This in incorrect. The exact point was not made or submitted to Judge DeHaven, or considered by him at all. Appellants did argue that the findings of the referee were *res adjudicata,* but it was only after these findings came back to court undisturbed and unchanged, before Judge Dietrich that they became the "law of the case". The point is covered in appellants' brief, page 20.

(B)

ASSIGNMENT.

Appellee's reply to appellants' point one is based upon only one authority which is in point, aside

from some general language in the text book of Jones. This is the case of Fortunato v. Patten. It is cited three times on two pages (pp. 21 and 22) of his brief but, nevertheless, it is only one case and is not the law in the United States nor in California.

Appellee's citation on page 21 from Jones, Pledges and Coll. Securities, is based *solely* on the Fortunato and other *New York* cases.

Jones on Pledges (Sec. 136a) cited by appellee on page 22, *begins by stating the law as contended for by appellants,* as follows:

> "A contract which would otherwise be assignable *may be non-assignable without the consent of the adversary party,* by inserting a clause providing it shall not be assigned."
>
> Jones, Pledges & Coll. Securities, 3rd Edition, p. 143, Sec. 136a.

The cases of Butler v. Rockwell and Crouse v. Mitchell merely state the rule, not in question in this case, that where the provision is a general one and construed to be merely to prevent negotiability *of the contract* (as in the Butler case) or merely the ordinary provision against transfer without consent, in a lease (as in the Crouse case), an assignment as security will be recognized.

The California case of Curtiss v. Aetna Life Ins. Co. involved a policy which by its very terms was payable to Curtiss "or assigns".

The opinion in the *later* case in California cited on page 26 of appellants' brief (Butler v. San Francisco G. & E. Co.) is the last word on the subject in this state, as the case of La Rue v. Groezinger, before it, and as is the case of Burck v. Taylor in the United States.

Thus are the "authorities" cited by appellee reduced to the one New York case of Fortunato v. Patten, and cases on which it is based, cited by Jones in his work on Pledges; wherein we give our assent to appellee's contention (p. 27) that the law of *California* must govern this matter, (as against the decision in Fortunato v. Patten).

Appellee's construction of the contract clause itself (on pages 19 and 20 of its brief) is *so forced* as to be quite "apparent". It is reached by leaving out of consideration such words in the paragraph as "any"—"he shall not assign any of the moneys" —and the pronoun "his" wherein the paragraph says it is "his claim" (the *contractor's* claim) that must not be assigned.

As to appellants' "point two", it seems to us, that the absolute incapacity of anyone but the company or *its* authorized agent (Strong) to get the money from the treasury, and the consequent total

failure of the bank to have *control,* or of the company to have surrendered it, has been demonstrated, and stands proved.

The only answer made to this is (appellee's brief, p. 30) that Strong had signed previous warrants at the *suggestion* of Mr. de Figueiredo, cashier of the bank and it is left to our imagination that he would probably do so again.

We are not unaware of the alleged power of mental suggestion, but it has not yet become a recognized legal agency for the transfer of commercial paper.

Fourth Street Bank Case.

The authority principally relied on by appellee —Fourth Street Bank v. Yardley, 165 U. S. 634— is distinguished by the fact that *a check* on the Tradesmen's Bank, the *fundholder*, payable to the Keystone Bank, the *assignee,* was made and *delivered* to the assignee at the time of the assignment, thus *surrendering complete control* by the assignor to the assignee. See Syllabus, 165 U. S., p. 635.

The case at bar presents none of the features of such a situation.

In the case at bar complete control of the *fund* in the hands of the *fundholder* was not surrendered in any manner whatever.

Bank v. Portland.

An "order" (which in the case at bar was *not* even an order) on the city auditor—not the *fundholder,* is no more effectual than the "order" on the "city recorder" in the case of Bank v. Portland (37 Ore. 33), which the Oregon Supreme Court considered insufficient because it was not drawn upon the fundholder and contained no words of transfer.

The attempt of counsel to *distinguish* this Oregon case from the case at bar merely because the bills were to be approved by the assignor is not well taken, because, on *principle* the cases cannot be distinguished.

Page on Contracts (which appellee likes to quote as an authority) says of this matter:

> "So, an order to a city official to deliver warrants to a specified company, is not an assignment of the fund against which such instruments are drawn".
>
> Page on Contracts, Vol. 3, p. 1965, Sec. 1278.

McIntyre v. Hauser.

Furthermore, the case of McIntyre v. Hauser, cited by appellee (p. 28), is not an authority, because the language quoted is *obiter dictum,* for the reason that the court held in that case that the facts alleged in the complaint amounted to a *tri-partite* agreement, in effect a pure novation,

there being a writing in that case containing words of transfer, surrendering complete control to the assignee and binding on, and directed to the fund-holder. Thus the case is to be distinguished from the case at bar, and is found not in point—not an authority.

For these reasons, therefore—on these two general grounds—it appears that the referee's conclusion that the bank had a legal and valid assignment is not well taken and should be reversed.

(C).

PRIORITY.

Concerning point three, appellants' contention (to summarize) is that even though the payment might have been due in a general sense, so as to make it generally assignable, such assignment if made (even though good as against a *later assignment)* is subject to be defeated by a "notice to withhold" at any time prior to the *maturity* of the payment, and that such is the true construction of the case of Newport Co. v. Drew.

Appellee's argument *begs* this question entirely, it seems to counsel, and is based upon the failure of the court below properly to construe the decision in the Drew case.

Again it is prayed that the prayer of appellants' opening brief should be granted.

San Francisco, California,
November 5, 1913.

Respectfully submitted,

A. F. Morrison,
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W. I. Brobeck,
Gavin McNab,
B. M. Aikins,
Milton J. Green,
Counsel for Appellant, John Daniel, trustee, of Metropolis Construction Company (a corporation), bankrupt.

C. A. S. Frost,
Counsel for Appellant, Paul I. Welles.

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES, and JOHN DANIEL, Trustee of Metropolis Construction Company (a corporation), Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),

Appellee.

APPELLEE'S REPLY TO NEW MATTER AND ERRONEOUS STATEMENTS IN APPELLANTS' REPLY BRIEF.

(Divisions refer to those of Appellants' Reply Brief.)

ERRONEOUS STATEMENTS UNDER DIVISION I.

Under the title "Off the Record", appellants' counsel in their reply brief accuse counsel for appellee of a *sophisticated* attempt to prevent the consideration of a legal argument.

Counsel for appellants admit the use of the following language, quoted by us from page 16 of the brief of Mr. Welles (who was the sole complainant

in this action), dated February 15, 1912, and filed on the hearing before the Referee:

> "It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank has wasted its discussion of that point, on pages 4, 5 and 6 of the brief."

They now seek to explain away their very apparent and positive abandonment at that time of "point one" of their opening brief on appeal; and, in doing so, fall into very serious error in their statement of *facts.*

In the first place, appellants' counsel attempt to show the circumstances under which the statement in Mr. Welles' brief of February 15, 1912, was made, and to show that this point was never abandoned. We do not agree with their statement of the circumstances, but we will confine ourselves to the printed record and undisputed matter in replying to it.

Counsel for appellants quote from a brief of appellee, alleged by them to bear the date February 2, *1913.* The final decree in this cause was made *prior to that date.* The brief from which the quotation is taken is dated February 2, *1912.* We agree with appellants' counsel that prior to this *last date* this point was raised. The assumption on our part that it would be raised again, accounts for our discussion of it in the brief of February 2, 1912. Then on February 15, 1912, the point is not only

abandoned, but counsel for Mr. Welles sharply inform all concerned that "the Bank has wasted its discussion of that point".

In the second place, counsel for appellants make the statement, on page 4 of their reply brief, that

> "*Thereafter,* on the hearings upon the third and final reference to the referee, however, the objection was again presented and urged" etc.

To offer some proof in the record tending to show the correctness of this statement, counsel refers to pages 266, 268, 269 and 271 of the transcript.

An examination of the transcript shows that all the matters and proceedings set forth at pages 266, 268, 269 and 271, referred to by appellants, took place on *January 9th and 17th, 1912,* pursuant to an order of reference of *December 26, 1911* (p. 263 Tr.), and *not* on the *third* reference which was pursuant to the order of *April 15, 1912* (p. 132 Tr.). Furthermore, there was *no* hearing on the third reference (pp. 132, 133 Tr.).

(C.)

At page 11 reply brief, to excuse the absence of a specific exception, counsel for appellants say: "The word *'consent'* itself is not used *because the Referee himself stated the case and his conclusions* (embracing the point) *without using that word."*

This is an astonishing statement in view of the fact that the Referee uses the word "consent" *three times* in discussing the very point (p. 152 Tr.).

It may be admitted that counsel for appellee went off the *printed record* by referring to appellants' brief of February 15, 1912, for the purpose of calling attention to the fact that the point now urged by appellants, to wit: that the assignment of the moneys due under the contract was void for lack of consent by the city, was abandoned before the lower Court.

But, while admitting that we went outside the *printed record,* we insist that we are within the *whole record,* and within our rights in view of the powers of this Court under

> Equity Rule 76 (as promulgated November 4, 1912).

In view of the supposed decision of the District Court of Appeal of California in Butler v. San Francisco G. & E. Co., this technical point is made much of in appellants' opening brief, and it is only natural that counsel for appellee should not have anticipated the resurrection of a dead issue. Under these circumstances it would seem eminently proper to invoke the aid of the above rule.

But as appellants' counsel admit the portion of the brief quoted by us, and as that portion only is material here, it may not be necessary to invoke the rule.

The point then is, not that counsel for appellee are making a *sophisticated* attempt to prevent argument of "point one," but, that appellants have by their own deliberate and positive attitude estopped themselves from raising the point on appeal.

ERRONEOUS STATEMENTS UNDER DIVISION II.

Counsel for appellants, at page 12 of their reply brief, designate a very peculiar misstatement of facts made at page 41 of their opening brief, as an "error in quoting from the transcript". They then proceed to extenuate the "error" by showing that counsel for appellee were not justified in concluding therefrom that there was no evidence that Mr. Strong collected the money. Counsel fall from error into error. No such conclusion was drawn, as an examination of appellee's brief will show. Counsel for appellee draw no *conclusions* from the "error", or from any other source: they state *facts.* They state that there is *no evidence* supporting the italicized "error" of appellants' counsel; and they state the *testimony* showing that the *Bank's cashier and not Mr. Strong received the money.* These are not conclusions from "error", but facts from the record.

The new matter quoted by appellants' counsel at page 12 of their reply brief, tending to show that Mr. Strong held the position of assistant secretary and agent of the company, supports a fact which has never been disputed. But when they follow that up on the next page, with the statement that the receipt of the company's agent was necessary in order to get the money from the treasury,

> "because the company or its authorized agent (and Strong was its 'authorized agent' on the face of the demand) was the only 'person shown to be entitled' according to the finding of the referee (p. 144 Tr.)," etc.,

they make a statement which is misleading, in that it insinuates that the Referee made some finding supporting it.

On the contrary, there is no finding that the company or its authorized agent was the only "person shown to be entitled", or that it or its agent was entitled to receive the demand or the money. The finding referred to, and which is mutilated to meet the needs of appellants, is as follows:

> "That all demands of this kind, after being approved by the Board of Public Works, the Board of Supervisors, and the Mayor, are received by the Auditor and by him delivered to the person shown to be entitled thereto" (p. 144 Tr.).

The Referee also found (bottom of p. 144 Tr.):

> "The cashier received from the Auditor the paper demands for the third progressive payments, such demands being made in the name of the Metropolis Construction Company when delivered to the cashier."

ERRONEOUS STATEMENTS UNDER DIVISION III.

Appellants' counsel state, page 14 reply brief, that the record sustains the inference that the Court below considered that the Bank should have an opportunity to produce "further proof on final hearing", as a reason for sending the case back to the Referee a third time. To support this statement they refer to pages 267 and 268 of the transcript. An examination of these pages in conjunction with page 263 shows that the proceedings re-

ferred to were had on *January 9th and 17th, 1912;* while the case was sent back the *third* time on *April 15, 1912,* and no additional evidence was introtroduced on the third reference (pp. 132, 133 Tr.).

ERRONEOUS STATEMENTS UNDER DIVISION IV.

(A.)

Counsel for appellants state, page 15 reply brief, that their contention that the ruling of Judge De Haven became the law of the case, was not submitted to, nor overruled by Judge De Haven, nor considered by him at all; and that our statement that it was is incorrect. Let us go to the record.

On March 8, 1912, the Referee filed his second report, wherein he found, as a conclusion, that because the facts remain unchanged the memorandum opinion of December 12, 1911, governed, and that if Welles was entitled to the relief demanded in his bill on December 12, 1911, he was entitled to the same relief on March 8, 1912 (p. 124 Tr.). To this conclusion of the Referee the Bank filed exception (p. 126 Tr. "Fourth".). The report and exceptions came on for hearing before Judge De Haven on April 15, 1912, and the case was sent back for the third time with instructions to the Referee to report his findings and conclusions without reference to former proceedings (p. 128 Tr.). Thus it will be seen that Judge De Haven had the *very point* before him, and must necessarily have passed on it.

(B.)

Counsel for appellants refer to the case of Butler v. San Francisco G. & E. Co., on page 17 reply brief, as "the last word on the subject in this State". Although the case does not involve the validity of an assignment for security, or of money earned, it again becomes our duty to point out the *fact* that this case is *not* the last word, but is still *undecided,* and that a *rehearing* has been granted by the Supreme Court.

In the foregoing pages counsel have tried to refrain from anything in the nature of reply argument except where new matter is introduced, and to confine themselves to pointing out distorted or misstated facts.

San Francisco, California,
November 10, 1913.

Respectfully submitted,

GEO. A. KNIGHT,
CHAS. J. HEGGERTY,
JAMES B. FEEHAN,
JOSEPH W. BERETTA,
Attorneys for Appellee.

Contents.

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY (a corporation), bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),
Appellee.

APPELLANTS' REPLY TO APPELLEE'S PETITION FOR A REHEARING.

Appellants respectfully submit their reply to the appellee's petition for a rehearing.

I.

APPELLEE'S STATEMENTS ENTIRELY OFF THE RECORD.

According to the petition for a rehearing, mention was made of the point on which the judgment of the court below is reversed in briefs that were

filed in February and August, 1912; but, it is alleged, "the point was never again mentioned directly or indirectly then or thereafter; and was never urged *in its present form*" until after the transcript had been filed in this court. *None of this is in the record.*

Another palpably uncertain statement appears on page 11 of the petition where it is stated that the point was never raised in the court below.

These statements and statements of like import in the petition are *entirely outside the record* and are *absolutely unsupported by the record!*

Not only is counsel's position in this respect unsupported by the *record,* but *the contrary is shown by the record to be true!* The record shows that the exact point was heard (Tr. p. 152) and decided (Tr. pp. 171, 172) by the referee.

The finding of the referee (p. 152) adopted by the court (pp. 183, 185 and 187) is:

> "The contract between the city and the company contains a provision that neither the contract nor the money payable thereunder should be assigned without the consent of the city. The consent of the city was not obtained upon the alleged assignment in question. An assignment is not void because of the failure to obtain such consent. Such a provision is for the protection of the city and can only be invoked by the city."

The record also shows that this report came before the court upon proper exceptions, was con-

sidered by the court (Tr. p. 183) and the exceptions overruled and the report in all respects confirmed (Tr. p. 187). The action of the court in overruling each of appellants' exceptions to the report of referee was assigned as error (Tr. pp. 192-205) and the matter brought before this court upon proper specifications. The parties *argued this matter fully* on the original hearing and what is said in the petition is *mostly a rehashment of arguments made in the briefs on file!* As the arguments *occupied a prominent place in the briefs* it should be assumed that the court did not overlook it.

Rosenstirn v. U. S. 171 Fed. 71; 96 C. C. A. 175, 177.

See

Appellants' Reply Brief, pp. 1 to 10 inclusive, devoted exclusively to a presentation of these matters; also,

Appellee's Brief, pp. 18, 19;
Appellee's Reply to New Matter, pp. 1 to 4, inclusive.

The statements alleged to have been made by counsel in argument of the case are *not in the record at all!*

If the arguments alleged to have been made by counsel in a brief were made, they were, of course, made by way of argument only.

The record, not the briefs of appellants' counsel outside the record, nor statements of counsel for appellee also outside the record, as to what arguments were made, is, of course, the only thing the court ought to consider.

The court having read appellee's *off-the-record* statement-arguments (or such of them as were presented on the original hearing), having decided the plea in abatement against him, and then *having considered the case on the merits and decided that, also,* against appellee; the rehashment of the alleged matter in abatement in the petition for rehearing is entirely out of place and should be disregarded.

Nor was the alleged excerpt from appellants' brief which appears on page 4 of appellee's petition for rehearing called to the attention of this court on the original hearing in any manner!

Therefore, it should not be considered on the petition for a rehearing, even if it were in the record.

Reece Folding Mach. Co. v. Fenwick, 72 C. C. A. 43, 44.

Even if appellee's assertions were all true and supported by the record, this court has the option to notice a plain error, not assigned, under its rules; and the action of the court in so doing would not be assailable from any standpoint counsel for appellee has assumed.

Rule 11, U. S. C. C. A. Ninth Circuit.

None of the matters mentioned, therefore, constitute any reason or ground whatever for granting a rehearing.

II.

APPELLEE'S STATED REASONS INSUFFICIENT.

A rehearing is requested upon two grounds, *first, astonishment and surprise* alleged to have prevented appellee from bringing up a full and fair record; and, *second, novelty and unexpected importance* of the point upon which a decree herein has been reversed (petition for rehearing, pp. 1 and 2).

(A) The first ground alleged constitutes no reason for granting the petition because that counsel was surprised or professes astonishment at the result of the hearing does not constitute a legal ground or reason for reopening a cause; *"nor is it even persuasive that error has been committed"*.

> People v. Lake County Court, 26 Colo. 386, 391; 46 L. R. A. 850, 852.

Nor should a rehearing be granted because of the fear of counsel that by reason of their overconfidence in the strength of their position they failed sufficiently to present their cause. It is said on authority that to grant a rehearing for such reason would establish a "dangerous precedent".

> State v. Woodbury, 30 Pac. (Nevada) 1006, 1011.

Errors or defects in the record do not constitute ground for granting a rehearing.

Bushman v. Nickels & Brown Bros., 1 Cal. App. 266-270.

Gen. A. F. & L. Assurance Corp. v. Lacey, 151 S. W. (Texas) 1170-1172.

Nor should a cause be reheard or reargued because of matters not in the record.

St. Louis & S. F. Ry. Co. v. Cartwright, 151 S. W. (Texas) 1094;

3 Cyc., 214.

(B) The second ground advanced by counsel is not well taken, because it has long been settled that a rehearing will not be granted solely because questions of great importance are involved.

Camfield v. U. S., 67 Fed. 17.

Nor because other cases involving a large amount are pending in the courts, depending on the same questions as are found in the principal case.

Butler v. Walker, 80 Ill. 345, 350.

Therefore, the *"distinctly stated" reasons* put forth by appellee as his grounds for desiring a rehearing appear to be insufficient.

The statement of these grounds constitutes a waiver of all others.

Rule 29, U. S. C. C. A., Ninth Circuit;

3 Cyc., 216;

Willson v. Broder, 24 Cal. 190, 192;

Kerr v. Hicks, 45 S. E. (North Carolina) 529.

Hence the petition for rehearing should be denied.

III.

PETITION IS MERE REARGUMENT.

The petition is a mere reargument of the case (except in so far as it attempts to suggest a diminution of the record) and should not, therefore, be entertained.

Suwannee & S. P. Ry. Co. v. West Coast Ry. Co., 39 So. (Fla.) 538, 539.

Counsel should assume that his points have *not* been overlooked, rather than that they have been!

Rosenstirn v. U. S., 171 Fed. 71; 96 C. C. A., 175, 177.

IV.

NO FOUNDATION LAID FOR REQUEST TO AMEND RECORD.

Appellee's request for permission to amend the record should not be granted because it is not properly brought before the court under the rule.

Rule 18, U. S. C. C. A., 9th Circuit.

V.

AMENDMENT NOT SHOWN TO BE POSSIBLE.

Nor does it appear that the matter appellee wishes to insert was ever made a part of the

statement of the case or of the evidence settled in the court below. Nor does it appear by certified copy that it could be now made part of such statement. Consequently, even if a motion to refer the record back for resettlement were made in this court (even before decision), it should, under the authorities, be denied.

Dow et al. v. U. S., 81 Fed. 1004; 27 C. C. A. 42.

VI.

MOTION, IF NOW MADE, WOULD BE TOO LATE.

In addition to which the motion now made comes too late in any event. Such a motion should not be permitted after the first term of entry of the case (May, 1913)!

Rule 18, U. S. C. C. A., Ninth Circuit;

St. Louis & S. F. Ry. Co. v. Cartwright, 151 S. W. (Texas) 1094.

VII.

AND SUCH MOTION WOULD BE DENIED EVEN IF OMITTED MATTER HAD NOT BEEN OMITTED.

Even if the alleged evidence had been incorporated in the statement and printed in the record, the failure of counsel to call attention to the omission on the original hearing would be sufficient ground for denying its petition.

Reece Folding Mach. Co. v. Fenwick, 72 C. C. A. 43, 44.

VIII.

PETITION TO AMEND IS WITHOUT MERIT.

Very special and exceptional circumstances must be shown to obtain leave to have omissions or defects in a record on appeal or writ of error supplied after a case has once been decided and while an application for rehearing is pending.

3 Cyc., 214;

Black Hills Brewing Co. v. Middle West Fr. Ins. Co., 141 N. W. (S. D.) 358;

Rule 18, U. S. C. C. A., 9th Circuit.

In the case last cited the court quoted with approval the opinion of the court in

Ricks v. Bergsvenden, 8 N. D. 578, 580; 80 N. W. 768, 770,

which we also beg leave to quote, as follows (italics are ours):

> "On rehearing (Nov. 7, 1899).
>
> In this action appellant's counsel has filed a petition for a rehearing, and in connection therewith has requested this court to withhold the remittitur, and to send down the record, to enable the appellant to apply to the district court for a resettlement of the so-called 'statement of the case', with a view of incorporating therein certain essential specifications which were omitted from the original record as transmitted to this court, and upon which the case was disposed of by this court. These requests, coming, as they do, after the case has been submitted and decided, and after an opinion has been written and filed, are not seasonably made. Without holding that this court is devoid of authority to grant such a request, under any possible state of facts, we

> do, without hesitation, hold that similar requests will ordinarily be denied, *and will not be granted in any case, unless it presents features which are peculiar and very exceptional,* and such as this case does not present."

Now there are no exceptional circumstances in this case in favor of appellee's petition to have the alleged evidence brought up.

On the contrary, the request is a mere afterthought, because *said alleged evidence was never mentioned by anyone connected with the case at any time until it appeared in appellee's petition for rehearing!* IT WAS NOT MENTIONED IN APPELLEE'S TWO BRIEFS ON THE ORIGINAL HEARING IN THIS COURT!

On the taking of testimony before the referee it was stipulated that all the specifications should be considered in evidence, that they might be referred to by counsel on argument, but that they need not be copied UNLESS *counsel desired to read some part of them which he wanted to call attention to.* The stipulation (in part) is as follows (Tr. p. 266, fol. 288):

> "It is agreed that those specifications, in part or in whole, may be referred to by counsel on argument in this case, and they may be admitted in evidence, *but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to.*"

Then at the same moment and *pursuant to that stipulation* counsel for appellee read in evidence the very portion of the specifications containing,

among other things, the provision that the contractor should not assign or sublet the work in whole or in part and also that he should not either legally or equitably assign any of the moneys payable under the contract or his claim thereto unless with consent of the Board of Public Works (Tr. pp. 268, 269).

Under this stipulation and in this state of the case it was the privilege, at least, of counsel to have inserted the alleged additional evidence *if he desired "to call attention to" it,* because it was the letter and spirit of the stipulation that whatever counsel wanted "to call attention to" should be copied into the record! Counsel for appellee neglected to do this, then or at any subsequent stage of the proceedings, did not include nor attempt to include the alleged evidence in the statement of proceedings and testimony which counsel for appellee stipulated should be settled and allowed by the court (Tr. p. 273), and which contains a statement *approved by appellee* (Tr. p. 212) in words as follows:

> "That *all of the testimony concerning the alleged assignment* of the fourth progress payment on the Fourth and Kentucky streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the referee, is as follows, to wit:" (r. p. 212, fol. 238.)

Nor did appellee include the alleged evidence in its praecipe as to the transcript filed March 3, 1912 (Tr. p. 6).

The record was filed May 14, 1913, and the printed transcript July 1, 1913. Over *four months* thereafter (November 11, 1913) appellee, taking the right to close the argument, which really belonged to appellant, filed its second, *and the final,* brief in the cause, in this court.

During all this time no hint was made by appellee, not a word said, written or printed, concerning any alleged omission in the record!

Appellee filed *two briefs,* therefore, after the point in question was presented in appellants' opening briefs, both on the negative of the very proposition, without suggesting any omission in the record or finding fault with the record in any particular!

Hence, it is fair to infer appellee did not rely on the alleged omitted evidence nor desire to call it to the court's attention, and to conclude that there are no special circumstances appearing in favor of its application, and that the court should not take notice thereof; *hence,* that the petition should be denied.

IX.

PETITION FOR REHEARING WITHOUT MERIT.

There is, also, *no merit* in appellee's application for permission to amend the record nor in appellee's petition for a rehearing because, if the application were granted and the alleged evidence could

be produced, it would avail the appellee nothing, for the reason that the legal aspect of the case would not thereby be changed in any particular.

Appellee's argument (brief, pp. 7, 8) proceeds upon the theory that the legal maxim "*expressio unius est exclusio alterius*" is applicable to the case at bar. In support of this contention reference is made to the case of Burnett v. Mayor and Aldermen of Jersey City, 31 N. J. Eq. 341.

Admitting for the sake of argument (but not as a fact) that the alleged omission in the record is a part of the contract, the Burnett case, nevertheless, is not in point. In the Burnett case the provision against assignment is accompanied *in the same sentence* by the statement of what the board may do in case the provision be violated. In the case at bar, the provisions which appellee contends should be inserted in the record do not accompany and are not directly connected with the language prohibiting the assignment by contractor of moneys payable under the contract or his claim thereto. On the contrary the specifications which appellee desires to have inserted appear to apply generally to the whole contract and to the breach of any of its conditions. But the alleged specifications themselves *carefully provide against their being construed as exclusive* by the condition in the second paragraph thereof, as appearing in page six of appellee's petition, that the right to declare the contract terminated shall reside in the board

"whether any alternative right is provided or not"! (Appellee's Brief, p. 6).

In the Burnett case the city was held, also, to have waived its right to notify the contractor to discontinue work by permitting him to continue after notice and bringing the fund into court and consenting to its distribution. In the case at bar the board had no notice or knowledge of the attempted assignment to the appellee and never gave its consent (Tr. p. 146) and a mandatory injunction was issued to bring the fund into court (Tr. p. 116)!

In Strauss v. Yeager (Indiana, 1911), the plaintiff sued upon a contract for the purchase of land to recover an installment of the purchase price. The contract contained a provision, relating to remedies, to the effect that either party in case of failure to perform by the other, might enforce specific performance or recover damages for the default. The question arose whether the maxim *"Expressio Unius est exclusio alterius"* applied to the provisions of the contract relating to the remedies so as to limit the plaintiff to an action for specific performance or damages as provided in the contract and so as to prevent his suing on the contract to recover the purchase price. It was held that the maxim did not apply. The court said:

> "The reason for this rule is stated in 2 Lewis' Sutherland Statutory Construction (2d Ed.), Paragraph 491, as follows: 'Expressio unius est exclusio alterius. This maxim, like

> all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusion; but otherwise, the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act.' * * *
>
> "We do not feel justified in extending the application of this maxim to a subject where it has not been applied so far as we are able to ascertain, and especially so as the reason of the rule does not seem to justify such application."
>
> Strauss v. Yeager, 93 N. E. (Indiana), pp. 881, 882.

Applying this precedent to the argument made by appellee in its brief, it will be observed that the alleged provision of the contract in the case at bar relating to remedies is wholly *general, not creative,* nor in derogation of any existing law or other provision of the contract and *expressly,* by its terms, *provides* that the right to declare the contract terminated shall not be construed to be exclusive by reserving that right *"whether any alternative right is provided for or not"!*

Therefore the maxim would not apply to such a contract as this even if it contained the provision alleged to have been omitted from the record, nor would the case of Burnett v. Mayor be in point.

Wherefore, it appearing that appellee's argument, just hereinabove mentioned, is not well taken, and it being the only argument in the petition other than a re-argument of the case, the petition should be denied.

X.

ANSWER TO APPELLEE'S RE-ARGUMENT OF THE CASE.

Appellee devotes the last twenty pages of his printed brief entirely to re-argument of the cause.

But error of law is not *"briefly"* nor *"distinctly"*, nor at all stated as one of the grounds of the petition (see Rule 29).

Appellants' counsel have carefully perused this argument and examined the authorities cited therein and in the opinion of the court. Counsel for appellant are not tempted to reargue the case, being satisfied that the conclusions of the court in its opinion and the reasons given therefor are correct.

Appellants desire to note that the provision of the contract in the case at bar against assignment of the contract by the contractor's claim thereto, are separately stated, both with equal force, under the same general sub-head and in the same general language, in the contract. Although in the same general portion, or sub-head, of the specifications these provisions are in separate paragraphs. The first appears on page 268 and the second on page 269 of the transcript. Thus the *explicit* covenant

of the contracting parties to prevent any assignment whatever of moneys payable under the contract or any claim thereto, apart from and in addition to their likewise *explicit* covenant prohibiting assignment of the work itself, is clearly denoted and emphasized!

And thus the distinction by *inference* which appellee seeks to draw between provisions prohibiting assignments of the contract and of moneys payable under it is impossible to be drawn concerning this particular contract, because in this particular contract the provisions are so plainly stated as not to leave any room for inference!

For convenience the two provisions are here given:

> "SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works." (Tr. p. 268.)
>
> * * * * * * * *
>
> "No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works." (Tr. p. 269.)

Thus the two inhibitions, the one against assignment of the contract for personal services or work,

essentially unassignable, and the other against assignment of the moneys payable under the contract or the contractor's claim thereto, are placed *by the particular contract in the case at bar,* upon like footing.

The provision against assignment is not as to one only, nor as to both jointly, but is as to *each.* Nor is language of prohibition used as to one which is not used *also* as to the other!

Here are plain, unequivocal, *unlimited* prohibitions upon assignment of the work, *also* of moneys payable under the contract, *also* of the contractor's claim to moneys payable under the contract, *both* legally and equitably!

A more unlimited purpose to *absolutely prohibit* assignments could hardly be expressed in language. What more would it seem necessary to add, what other words necessary to use, to express an *unlimited* purpose to prohibit? *Obviously nothing more is required.*

Then, certainly, what is argued in the petition for rehearing concerning cases where the court is "able to discern a limited purpose, in case of a breach of the provision against assignment", or concerning the assignment of executory contracts, is of no persuasive moment, not being in point.

Therefore, it is clear that no other conclusion than that already reached is possible in this case.

Wherefore a rehearing should be denied.

3 Cyc. 213; *note* 14;

Black Hills B. Co. v. Middle West F. I. Co., 141 N. W. 358.

XI.

APPELLEE'S MISQUOTATION FROM THE RECORD CORRECTED.

Attention is also respectfully called to the fact that in quoting from the record the clause of the contract in question relating to the non-assignment of "moneys payable", and so forth, on page 16 of its brief, appellee *omitted* to quote that part of the clause which refers to the contractor's *"claim"* to such "moneys payable". The words "OR HIS CLAIM THERETO" are omitted (see transcript, page 137).

As appellee's argument is directed to this point, the omission is important to be noted!

The prohibitory clauses are, therefore, quoted in full hereinabove.

Even without these words, *certainly when the omission is supplied,* appellee's argument as to the city's motives is not in point! As was said in the case of City of Omaha v. Standard Oil Co., 55 Neb. 337 (quoted in the opinion):

> "But it is needless for us to speculate on the motives for the city's action."

XII.

THE RIGHT OF THE MATTER.

The proposition that solemn and explicit agreements in writing between individuals inhibiting assignments or in other respects will be upheld and enforced in law and in equity and binding upon the parties and all who deal with them in reference to the contract is not surprising or novel.

It is the principle of decision in the case of Burck v. Taylor (152 U. S., Sup. 649), although counsel seems not to apprehend it, and its statement and enforcement in this case is, we think *according to the right of the matter.*

Appellants, therefore, pray that the petition for a rehearing be denied.

San Francisco, California,
April 17, 1914.

Respectfully submitted,

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No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY (a corporation), Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),

Appellee.

APPELLEE'S BRIEF ON PETITION FOR A REHEARING.

Statement.

On March 9, 1914, the decree of the District Court herein was reversed on the ground that a certain provision of the specifications annexed to the contract between the Board of Public Works of the City and County of San Franciesco and Metropolis Construction Company made void the assignment of the fourth progress payment by the company to the Portuguese-American Bank, appellee.

This Court, in holding the assignment void under the provision referred to, said:

> "We see no reason why this provision of the contract under consideration shall not be given the meaning and effect which its words import. It plainly stipulates against the assignment of payments."

At the time it rendered its opinion, this Court had before it only the provision referred to, and did not have before it that portion of the specifications in which the provision appears.

On April 6, 1914, appellee filed its petition for a rehearing, setting forth therein, as a first reason, facts which had caused the omission from the transcript of record, of that portion of the specifications containing the provision relating to assignments; and as a second reason, that the decisions cited by counsel for appellants and relied upon by the Court do not support the conclusion that an assignment without consent is *void* and that its invalidity may be set up by a stranger to the contract.

On April 28, 1914, appellee filed a petition and motion for certiorari for diminution of the record for the purpose of having incorporated therein that portion of the specifications known as "General Provisions", containing the provision against assignments without consent, in support of the first ground stated for rehearing.

On May 4, 1914, after argument by counsel for appellants and appellee, this Court granted the

petition and motion for certiorari, and in accordance with the order and award thereon a supplemental transcript of record containing the above mentioned "General Provisions" has been certified, printed and filed herein.

A consideration of the "General Provisions" set out in full in the supplemental transcript, will explain why the point upon which the decision herein was reversed was not raised by appellants in the Court below, and why appellants have made such strenuous efforts to keep the matter out of the record.

Appellants filed a brief in opposition to the appellee's petition for a rehearing, but as it presents nothing new, and consists almost entirely of argument against allowing appellee to amend the record, we will pass immediately to the arguments in support of the petition.

This brief will be divided into two parts: the first treating of the materiality of the new matter found in the "General Provisions" in the supplemental transcript of record; and the second treating of the validity of the assignment.

I.

MATERIALITY OF THE "GENERAL PROVISIONS".

On pages 14 and 15 of the supplemental transcript of record, under the heading SUB-CONTRACT,

is the provision against sub-letting and assignment without the consent of the Board of Public Works. For convenience we subjoin it:

"SUB-CONTRACTS: The contractor shall constantly give his personal attention to the faithful prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof without the consent or authorization of the Board of Public Works.

With his request to the Board of Public Works for permission to sublet or assign the whole or any part of the herein required work he shall file a copy of the contract which he proposes to enter into for subletting or assigning the whole or any part of the herein required work and he shall state the name and place of business of such sub-contractor as he intends employing together with such other information as will enable the Board of Public Works to determine the responsibility and standing of said sub-contractor.

No sub-contractor will be considered unless the original contract between the contractor and the Board of Public Works is made a part thereof, nor unless it appears to the Board of Public Works that the proposed sub-contractor is in every way reliable and responsible and fully able to undertake that portion of the work which it is contemplated to sublet, and to complete said work in accordance with these specifications and to the satisfaction of the Board of Public Works.

No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless

with the like consent of the Board of Public Works."

As a part of the same "General Provisions", page 24 of the supplemental transcript, we find the following:

"TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.

The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the contractor shall be deemed a complete termination of the contract.

Upon the contract being so terminated, the contractor shall immediately remove from the vicinity of the work all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work, and he shall forfeit all sums due to him under the contract, and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract."

These two provisions must be read together to determine what the intent of the parties was in placing the provision against assignment in the specifications annexed to the contract.

Upon a consideration of the "General Provisions", two main points are presented:

(a) An assignment of payments without consent was at most merely a breach of a condition of the contract, which could be taken advantage of only by the Board of Public Works.

(b) The provision against assignment of payments without consent, is a purely collateral condition.

(a)

An assignment of payments without consent was at most merely a breach of a condition of the contract, which could be taken advantage of only by the Board of Public Works.

Failure to comply with any of the conditions on the part of the contractor *shall be deemed a breach of contract, and the Board of Public Works shall have the right to declare the contract terminated.* (Supp. Tr. p. 24.)

Here is a clear and direct declaration in the instrument itself of how a breach of any condition thereof will be viewed by the other contracting party. Nowhere in the entire instrument is there a word to the effect that an assignment without consent shall be void or deemed void. Even if the language terminated here, the case would fall squarely within the exception approved in *Hobbs v. McLean,* 117 U. S. 567, and *Burck v. Taylor,* 152 U. S. 634.

But the stipulation does not terminate here. It goes on, and provides *how* the *Board of Public*

Works may terminate the contract. It may do so by *resolution* and service of a copy thereof on the contractor.

Here we find not only a *specific right reserved,* but the *specific party named who shall exercise that right.*

But this is not all. The specific penalty to be incurred in case of a termination as provided is set forth. The contractor shall immediately remove all his property not used in the work, shall forfeit all money due to him under the contract, and shall be liable jointly with his sureties for all expense and damage to the city by reason of his failure to complete the contract.

While appellee maintains that the opinion in *Burck v. Taylor* will not bear the construction placed upon it by this Court, yet in the light of this new matter now in the record the question of the construction to be placed on that opinion becomes entirely immaterial. The above provisions of the contract by clear implication reserve to the Board of Public Works alone the right to take advantage of a breach of its conditions.

In *Hobbs v. McLean* (supra), Section 3737 of the Revised Statutes was under consideration, it is as follows:

> "No contract or order, or any interest therein, shall be transferred by the party to whom such contract or order is given to any other party, and any such transfer shall cause the annulment of the contract or order transferred,

> so far as the United States are concerned. All rights of action, however, for any breach of such contract by the contracting parties, are reserved to the United States."

Here the provision against transfer is stronger than in the case before the Court in that no mention is made of consent. In other respects it closely resembles the provision under consideration: it states what the result of a transfer will be, and also reserves to the United States any alternative remedies for breach of contract.

In commenting upon this provision of the Revised Statutes, the Court in *Burck v. Taylor,* at page 648, lay down the rule in these words:

> "By the section quoted not only was a transfer of the contract prohibited, but also the result of such a forbidden transfer declared. In terms it was said that any 'such transfer shall cause the annulment of the contract or order transferred, so far as the United States are concerned.' *Expressio unius est exclusio alterius.* The express declaration that so far as the United States are concerned, a transfer shall work an annulment of the contract, carried by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute. The Government in effect, by this section, said to every contractor, You may deal with your contract as you please, and as you may deal with any other property belonging to you, but so far as

we are concerned you, and you only, will be recognized either in the execution of the contract or in the payment of the consideration.

It is familiar law that not every contract in contravention of the terms of a statute is void and the courts will search the language of the statute to see whether it was the intent of the makers that a contract in contravention of it should be void or not. Harris v. Runnels, 53 U. S., 12 How. 79; Miller v. Ammon, 145 U. S. 421; Panghorn v. Westlake, 36 Iowa 546.

It was in pursuance of this line of thought that the Court in *Hobbs v. McLean,* ruled as it did as to the effect of a transfer by a contractor with the United States of an interest in his contract to a third party. * * * ''

In the case of

Burnett v. Mayor and Aldermen of Jersey City, 31 N. J. Eq. 341,

the facts are almost identical with those in the case before the Court. The contract there provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the Board of Public Works, to be signified by endorsement on the contract, and that for a violation of this provision the board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against

subsequent creditors giving notice under the lien law. The Court held (pp. 352-353):

> "The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution."

The provisions of the contract before the Court *do not* declare that an assignment without consent *shall be void.*

The only provision is that such an assignment shall be *deemed a breach of the contract.* If the Board of Public Works does not desire to take advantage of the usual remedy for breach of contract,—a suit for damages,—it *may* avail itself of the remedy provided, namely, declare the contract terminated and compel the contractor to remove from the vicinity all his property, and enforce against him the penalties enumerated.

The point we desire to emphasize especially is this: the remedy is reserved to the *Board of Public Works,* and it must *act* in the matter by adopting a *resolution* declaring the contract terminated. So long, therefore, as the city makes no complaint,

third parties cannot be heard to urge the objection that a formal consent has not been obtained. (*Burnett v. Jersey City*, supra.) The assignee is not forbidden to take title. The prohibition is simply this: You (the contractor) shall not assign without our (Board of Public Works) consent: if you do, you will be deemed to have broken your contract with the city, and in addition to the usual remedies against you for a breach of contract, we will have the right to terminate this contract, order you from the job, forfeit what money is coming to you, and hold you and your sureties liable for all expense and damage caused the city by your failure to complete the work.

Therefore, as this provision against assignment without consent was beyond all question a matter between the contractor and the Board of Public Works alone, and concerned no one else, our next inquiry is: Did the Board of Public Works, or the city, invoke the remedy provided?

If not, then appellee is unquestionably entitled, as between it and appellants, to the possession of the fourth progress payment.

Neither the Board of Public Works nor the City and County of San Francisco, nor any officer, agent nor department thereof, has or asserts any claim to the fourth progressive payment, by either claiming the warrant therefor, or the proceeds of said warrant, declared to have been earned by and payable to the contractor, *before* it was assigned to the

Portuguese-American Bank, appellee herein, as part security for $30,000.00 then loaned by the appellee to the contractor.

It will be noted that the provisions before the Court require no formal consent. In this the case is stronger than that of *Burnett v. Jersey City* (supra), where the contract required a consent by endorsement on the contract.

(1) Paragraph VII of the amended bill of complaint (Tr. p. 12) expressly declares:

> "* * * that neither said Thomas F. Boyle individually or as Auditor of said City and County of San Francisco, or said City and County of San Francisco, nor any officer, agent or department thereof has or asserts any claim whatever upon said demand or to said sum of six thousand eight hundred thirty and eighty-five one hundredths ($6,830.85) dollars, or any part thereof, nor any offset nor counterclaim thereto; and that the sole and only reason why said demand, and its proceeds, said six thousand eight hundred thirty and eighty-five one hundredths ($6,830.85) dollars, is not immediately delivered by defendant Boyle to said defendant trustee is that there exists some doubt in the mind of defendant Boyle as to whether said trustee or complainant or said defendant bank is the one rightfully entitled thereto."

And paragraph IX of said bill of complaint (Tr. p. 15) expressly states:

> "That no person, firm nor corporation has or asserts any claim, right or offset or counterclaim whatever to said demands or moneys, or any part thereof, save only complainant, said

> Trustee defendant and Portuguese-American Bank of San Francisco, defendants herein."

(2) The amended return to the order to show cause and answer of Auditor Boyle (Tr. p. 67) expressly declares:

> "* * * and that the City and County of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder."

(3) The answer of appellant John Daniel, trustee (Tr. p. 79), expressly admits each and every allegation of paragraphs VII and IX of the bill of complaint as amended.

(4) The report of the referee (Tr. p. 147) contains this finding:

> "The Auditor makes no claim on his own account or on account of the city to the demand in controversy, and the city makes no claim thereto."

(5) Mandamus and injunction of the District Court ordered the Auditor to allow, approve and deliver to the defendant John Daniel, as trustee, to abide the result of the action, the proceeds to be distributed to whomsoever shall be lawfully entitled. (Tr. pp. 115-116.)

It requires no authority to show that this is a complete waiver by the city: the waiver of the breach of any condition by the contractor is involved by necessary implication in the express dec-

laration by the Auditor that neither he nor the city makes any claim to the fourth progress payment.

Again the facts square with those of *Burnett v. Mayor and Aldermen of Jersey City* (supra):

> "But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution." (pp. 352-353.)

All of which goes to show that the position of appellant Welles in the lower Court, that an assignment or sub-contract without consent was not void, but only a breach of contract, was legally sound. Until the appeal, no claim was made that the assignment to the appellee was *void* for lack of consent by the city. Appellant's position in the Court below is illustrated by the admission or stipulation on page 271 of the Transcript.

> "Mr. Heggerty. Will you admit that the assignment of the sub-contract by the Metropolis Construction Co. to Mr. Welles, the complainant in this action, was not consented to by the Board of Public Works?
>
> Mr. Frost. I will admit this, that there was never any formal consent by the Board of Public Works to the sub-contract from the Metropolis Construction Co. to Paul I. Welles; it being also however admitted that Mr. Welles acted as a sub-contractor with the knowledge of the Board of Public Works and of its inspector on the job, all the time, openly and without any concealment. He had his name in the telephone

book, and he had his sign, 'Paul I. Welles' as the sub-contractor on the job."

The same law certainly applied to the sub-contract of Mr. Welles as to the assignment of the bank. If a formal consent was required for the latter, it was equally required for the former. Yet appellant considered knowledge of the Board of Public Works and lack of concealment by Mr. Welles a sufficient waiver of the condition by the city. This admission likewise concedes the validity of the sub-letting without consent. It is a familiar principle of law that a *void act cannot be ratified.*

(b)

The provision against assignment of payments without consent is a purely collateral condition.

(1) The stipulation in this contract (Supp. Tr. p. 24) is:

"TERMINATION OF CONTRACT: All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.

Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated."

A condition is

"an agreement or stipulation in regard to some uncertain future event, not of the essential nature of the transaction, but annexed to it by the parties, providing for a change or modifica-

> tion of their legal relations upon its occurrence; a clause in an agreement which has for its object to suspend, to rescind, or to modify the principal obligation."
>
> *8 Cyc.,* 555, 556.

A condition is created by inserting the word "condition" in the agreement.

8 Cyc., 556 (note 99).

A "condition" can be imposed only by the grantor or owner, and in the absence of a limitation *he alone* can take advantage of a "condition". It is not for the benefit of strangers and they cannot take advantage of it. See

8 Cyc., 556 (note 99).

(2) The intention of the parties must control, and that intention is to be gathered from the whole instrument, and not from detached portions of it.

9 Cyc., 579.

The instrument before the Court ("General Provisions"), besides containing the express word "conditions" with reference to its stipulations, shows on its face a limited and subsidiary purpose of the city in placing therein the condition against assignments without consent.

In the first place, the contract itself (Tr. p. 25) contains absolutely no reference to the matter of assignment. Moreover, it refers to the specifications attached merely with reference to work and

materials, and the manner of making progressive payments.

Secondly, the "General Provisions" do not contain anything about the progressive payments. They are provided for in another part of the specifications, headed "Payments" and the provisions regarding them are set out in transcript, at pages 255-256:

> "In order to assist the contractor to prosecute the work advantageously, the city engineer shall on or about the last day of each month make an estimate of the value of the labor done and materials incorporated into the herein proposed work by the contractor.
>
> * * * * * * *
>
> "Upon each such estimate being made, the City and County of San Francisco will pay or cause to be paid to the contractor in the manner provided by law, an amount equal to 75 per cent of said City Engineer's estimate.
>
> Payments may at any time be withheld if the work is not proceeding in accordance with the contract, or if, in the judgment of the City Engineer, the contractor is not complying with the requirements of the contract and specifications."

Here no reference whatever is made prohibiting, restricting or referring to the assignment of these progressive payments when earned.

In accordance with this progress payment provision, the Board of Public Works, on December 5, 1910, ordered the fourth progressive payment to be made to the contractor by resolution (Tr. pp. 256-257) as follows:

"Resolution No. 8401, Second Series.

Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents ($6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street.

BOARD OF PUBLIC WORKS.

Dec. 5, 1910.

Passed.

(Seal of Board of Public Works.)

Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey."

Thirdly, the Charter of the City and County of San Francisco [which by stipulation (Tr. pp. 269-270) may be referred to on argument in this Court] contains no provision requiring or permitting the incorporation of a provision against assignment of payments in contracts by the Board of Public Works.

Fourthly, the "General Provisions" are part of the specifications attached to the contract, and ordinarily no one would think of looking among them to find a stipulation going to the root of the contract itself. The rule of "noscitur a sociis" would seem appropriately applicable to the condition forbidding assignment without consent. The specifications are referred to for the manner of doing the work, quality of materials, etc. The provision on assignment is immediately preceded and followed by stipulations imposed upon the contractor by the Board of Public Works relating to the performance

of the work, materials, measurements, sanitation, patents and inspection.

Lastly, the requirements for obtaining consent (Supp. Tr. p. 14) show that the object was to maintain a standard of responsibility in the performance of the work.

The only conclusion which can be drawn from the considerations is that the condition requiring consent to an assignment was purely subsidiary, collateral to the objects and purposes of the contract, and was inserted for the benefit of the Board of Public Works as an aid to its supervision and control of the work.

A collateral *covenant restraining assignment* will not be enforced in equity when it appears on the face of the contract that the prohibition to assign is not the main purpose of the contract, but merely collateral to its principal objects.

In *Griggs v. Landis,* 21 N. J. Eq. pp. 510-511, the Court states the rule as follows:

> "But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect."

A fortiori, a subsidiary or collateral *condition* will not be thus enforced.

We respectfully submit that the new matter brought before the Court by supplemental transcript fully sustains the conclusions of the referee and decree of the District Court.

This matter, which was before the lower Court under stipulation (Tr. pp. 266, 267 and 268), was omitted from the first transcript of record under the peculiar and very exceptional circumstances set forth in appellee's petition for rehearing and motion for certiorari for diminution of the record herein.

Irrespective of any error claimed by appellee, in the opinion of the Court reversing the decision in this case, the entirely new phase presented entitles appellee to a rehearing.

II.

VALIDITY OF THE ASSIGNMENT.

This case was reversed upon the point that an assignment of payments without the consent of the Board of Public Works was *void.*

Appellee respectfully submits that the Court erred in holding the assignment void.

Now, it is clear that as between the assignee of the contractor and the *other party* to the contract, the former gets no rights which are enforceable against the latter without his consent if the contract or the law requires the latter's consent to the

assignment. Hence, in a case of this kind it is immaterial whether the assignment is termed void or unenforceable, because the infirmity is equally available as a defense. For this reason, the result being the same in either case, it is unnecessary to make a distinction between void and voidable.

But, when the rights of third parties against the contractor are involved, and no objection to the assignment has been made by the other party to the contract, but he stands ready to pay to the party entitled, a different case is presented and it becomes very important to distinguish between assignments which are *void,* that is *mere nullities,* and assignments which are *voidable,* that is *unenforceable* against the *other party* to the contract *without his consent.*

29 A. & E. Ency. Law, 1067 (2nd Ed.).

An assignment without consent is *not* made *void* by the contract. If the contract declared that such an assignment would *be void,* under the general rule the word would be construed to mean *voidable.*

29 A. & E. Ency. Law, 1070 (2nd Ed.).

> "A stranger may take advantage of a void act, but not so of a voidable one."
>
> *Id.,* p. 1067.

In cases where this point was directly involved the Courts have been careful to maintain the distinction.

Though an assignment without consent may not be binding on the vendor, where the contract of sale

provided against assignment without the consent of the vendor, still it is specifically enforceable in equity by the assignee against the original vendee.

Sproull v. Miles, 82 Ark. 455; 102 S. W. 204.

There is a wide difference to be observed between provisions forbidding an assignment of executory contract involving the personal skill and responsibility of the contractor without consent, and those forbidding an assignment of moneys payable under the contract, without consent.

The first are of the very essence of contracts for personal service, and, in the absence of express covenant, will be implied by law. The same rule must, obviously, apply to the case of parties claiming moneys by virtue of an assignment of such contracts, while they remain *executory,* and which moneys can be earned only by the performance of the work. This principle of law is well illustrated by the following quotations from *Burck v. Taylor* (152 U. S. pp. 649, 650):

> "It is unnecessary to hold that the contractor might not be personally bound upon his promise *made before the performance of the contract* to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise it would be an independent promise on his part, it would not let the promisee *into an interest in the contract.* It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; that contract remain-

ing all the time the property of the contractor, subject to disposal by and with the consent to the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. *This was while the contract was executory and before the work was done,* and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, *before the work was done* Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. *The contract was still executory: nothing had been earned by Schnell,* and nothing was due to him." (Italics ours.)

And at pages 652, 653, we read:

"It is true that in that assignment it was stipulated that the profits were 'to be divided as the interests of the parties appear under the contract, or to their heirs or assigns.' If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the state and had made profits thereby, it may be that this plaintiff after giving notice

against assignment of the money after it is earned would run counter to the policy of the law, and should be positive, clear and entirely incapable of a liberal construction in favor of the creditor.

The provision of the specifications in this case is that the contractor

> "shall not either legally or equitably assign any of the moneys payable under this contract or his claim thereto unless with like consent of the board of public works" (p. 137 Tr.).

But the Charter (Art. VI, Chap. I, Sec. 21) ordains that any contract may provide for progressive payments, not to exceed *seventy-five per cent.* of labor done and material furnished up to the time they are made.

The contract (Tr. pp. 26 and 135-136) provides for these progressive payments.

The Board of Public Works on December 5, 1910, passed a resolution (Tr. p. 256) in words and figures as follows:

> "Resolution No. 8401, Second Series.
>
> Resolved, that the Metropolis Construction Company be, and it is hereby allowed the sum of six thousand eight hundred thirty dollars and eighty-five cents ($6,830.85) as fourth progress payment on its contract for the construction of sewers and appurtenances in Kentucky Street and Fourth Street.
>
> BOARD OF PUBLIC WORKS.
>
> Dec. 5, 1910.
>
> Passed.
>
> (Seal of Board of Public Works.)
>
> Passed by the following vote: Ayes, Commissioners Newsom, Laumeister and Casey."

This action of the board changed the claim of the contractor under the contract into a debt, which then became a fixed obligation due to him from the city, and which belonged to the contractor to do with as it pleased. It ceased to be subject to any of the conditions of the contract.

It is to be observed also that the consent required is that of the *Board of Public Works.* Construction must be reasonable, and in favor of, rather than against, freedom of disposition. Now, the question arises, If it was the intent of the parties to prohibit the assignment of the moneys *after the work was done* and *after they were earned,* why should the consent of the *Board of Public Works* be required to an assignment made *after* the demand had left their hands, and *after* their *final action* thereon under the *charter?*

This question cannot be satisfactorily answered on the theory of appellants. No other reasonable construction can be placed upon this provision of the contract, than this: That any assignment of moneys *before* they were earned and ordered paid by the Board of Public Works, would require the consent of that Board.

The distinction between the forbidden assignment of a contract, or of moneys to be earned by the performance of the work thereunder, and the assignment of moneys already earned by performance, is clearly brought out in *Snyder v. City of New York,* 74 N. Y. App. Div. 421.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commissioner of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under that contract was assigned to plaintiff without such consent, and an action was brought against the City of New York. The first point made by the city was that no cause of action vested in plaintiff as against defendant, as there could be no assignment without consent.

The Court held:

> "The clause in question is a restriction solely upon the assignment of the *contract as such* and not of moneys earned thereunder and which the city is bound to pay" (p. 426).

It was of the essence of the contract under consideration in *Burck v. Taylor*, that no interest in the contract should be capable of assignment without consent. Schnell purported to assign to plaintiff's assignor *an interest in the contract.* No consent was had to this assignment. Neither Schnell nor plaintiff's assignor, nor plaintiff, performed any work under the contract. It was held that plaintiff acquired no interest in the contract as against the defendant Taylor, who had been *substituted* in place of the original contractor, Schnell, and who had *performed the work.* If the

contractor was unable to carry out the contract, the state would have the undoubted right to have it carried out by a substituted party. This right would be impaired if the contractor could assign the contract without consent so as to give the assignee a claim to any interest therein; for if he could do so, a prior assignment might be asserted to deprive the substituted party of his compensation, and this right to secure a substituted contractor would be interfered with.

The cases of *Fortunato v. Patton,* 147 N. Y. 277; *Hackett v. Campbell,* 10 App. Div. N. Y. 523, affirmed in 159 N. Y. 537, and *Burnett v. Mayor and Aldermen of Jersey City,* 31 N. J. Eq. 341, directly pass upon provisions in municipal contracts forbidding assignment of moneys due under such contracts, and they decide that such provisions are for the benefit of the city only.

Hackett v. Campbell, supra, concerns a provision, contained in a contract between the board of education of the City of Yonkers and a contractor, to the effect that no assignment of any portion of the amount due upon the contract should be made without the consent, first had in writing, of a committee of the board of education.

It was held that the provision was one solely for the benefit of the board of education and its sole function was to prevent claims from being asserted against the city in the absence of its consent.

The contest was between a person who had an order for part of a fund, which was held to be an equitable assignment of moneys due the contractor, and various lien claimants. Consent to the assignment had not been obtained. It was held that the assignee was entitled to priority.

The following excerpt is taken from the decision, page 525, 10 App. Div. N. Y.:

> "The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.
>
> The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor* (*supra*) was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten.*"

Furthermore, it is to be noted that in no case has such an assignment been held *void.* Even in the case of *Burck v. Taylor,* which involved an assignment of a part of the contract itself, the Court, in its conclusion, states:

> "In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the state; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the state vested in the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of plaintiff's claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell made to plaintiff or plaintiff's assignor."

Here the Court enumerate matters which are entirely incompatible with the idea that they intended to hold that such an assignment would be *absolutely void.*

Likewise, in the following cases the Court held that such provisions must be specially pleaded in defense; even in a suit against the original party to the contract:

Burke v. Mayor of N. Y., 7 N. Y. App. Div. 128;

Episcopo v. Mayor of N. Y., 35 Miscel. N. Y. 623 (affirmed in 80 App. Div. 627).

The statement in *Devlin v. Mayor etc. of New York,* 63 N. Y. 8, that

> "Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall succeed to any rights in virtue of it, or be bound by its obligations",

while *obiter dictum,* is not applicable to the case at bar for the contract in case at bar does not in terms declare that assignees shall not succeed to any rights in virtue of it. In that case the Court held that the contract under consideration *was assignable* and permitted the assignee to recover against the *city.*

Likewise the statement from *Delaware County v. Diebold Safe Co.,* 133 U. S. 473, 488,

> "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable",

while *obiter dictum,* can not be said to mean that an assignment without consent, is *void.*

These statements merely affirm the right of a party to insert in his contract a provision against assignability so that an assignee shall acquire no right of action against him without his consent. Furthermore, in each case, the assignee sued the *other contracting party,* the City of New York in one case, and Delaware County in the other.

The decisions in the cases of *City of Omaha v. Standard Oil Co.,* 55 Neb. 337, *Murphy v. City of Plattsmouth,* 78 Neb. 163, *Suburban Electric Light Co. v. Town of Hempstead,* 38 App. Div. N. Y. 355, are all based upon the proposition that an assignment of the *contract itself* in violation of a provision against assignment will not entitle the *assignee* to recover against the *other contracting party.*

Mueller v. Northwestern University, 195 Ill. 236, concerns a contract for furnishing marble for a building belonging to the university and which contained a provision against assignment in the following words:

> "That the contractor shall not sell, assign, transfer or set over this contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and any such sale, assignment or transfer without such written consent of the architects first obtained thereto shall be absolutely null and void."

The plaintiff claimed as assignee of the moneys due the contractor and sued the university, *the other party to the contract,* after it had, in ignorance of plaintiff's claim, made a partial settlement with the contractor. The Court decided that, upon the facts of the case, plaintiff had no assignment, and that if he had, it was in violation of the contract provision and that he could not recover against the *university.*

In *La Rue v. Groezinger,* 84 Cal. 281, the plaintiff sued to recover upon a contract made by defendant with plaintiff's assignor, by the terms of which defendant agreed to purchase grapes raised by plaintiff's assignor upon certain property. Plaintiff purchased the property and took an assignment of the contract. Defendant refused to buy any grapes from plaintiff, claiming that the contract was not assignable. The Court held that the contract *was assignable.*

It will be noted that in all these cases the contest was between the *assignee* of one party and the *other party to the contract.*

There only remains to be considered the case of

Deffenbaugh v. Foster, 40 Ind. 382.

This case is much cited to the point that an assignment which is forbidden without consent is *void.* The facts were these:

A contract for street improvement provided that it should not be assigned without consent of the common council.

The contractor had a precept issued in his name against Foster, a property holder. Deffenbaugh sued Foster for the amount of the precept.

Deffenbaugh filed an amended complaint, but failed to allege an *assignment* to him *either with or without consent.* It does not appear that there was an assignment. A demurrer was interposed and sustained. On appeal it was held that this ruling was right.

Hence, the question was one of pleading,—no assignment whatever was alleged and plaintiff showed no right to sue. The effect of an assignment without consent was, therefore, not involved, and that part of the opinion is dictum. The Court also decided that the provision was for the protection of the City and property-owner against improper and unfaithful substitutes for the original contractor. While this was also dictum it shows that when the Court used the word *void,* it did not necessarily mean absolute nullity, since on its view of the case the infirmity was equally available to Foster as a defense whether the assignment was void or voidable.

Our point is, that such prohibitions do not make the assignments *void,* but merely *unenforceable* if the party in whose favor they exist sees fit to invoke them. We find no authority to the contrary.

It is to be remembered that in this case Mr. Welles is not claiming an interest in the contract; whatever rights he may have to the demand flow solely from Section 1184 of the Code of Civil Procedure.

Therefore, if the assignment to the Bank was not *void,* it was good and enforceable unless the defense of want of consent was set up by the city.

The case seems to fall squarely within the facts and decision of *Burnett v. Mayor and Aldermen of Jersey City,* 31 N. J. Eq. 341 (supra).

> "The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the

> assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution" (pp. 352-353).

With reference to the position of appellant Welles under Section 1184 of the Code of Civil Procedure, this Court, in the decision reversing the decree herein, assumes that one of the grounds, if not the principal ground, of embodying the provision in the contract was to afford subcontractors a better opportunity to secure payment.

This cannot be so, for the following reasons: In the first place no such purpose appears from the contract itself and the Court cannot deprive appellee of its rights by reading such an intent into the contract; in the second place the charter of this city and county gives the Board of Public Works no authority to insert any such provisions in its contracts; in the third place no such protection was necessary, as under Section 1184 the subcontractor could have given his notice at any time from the *commencement of his work* and until the contractor parted with his right to the money; and in the fourth place the sub-contractor is amply protected by the bond required of the contractor on

municipal work under Act 2895, General Laws of the State of California. The opinion of Judge Dietrich is a clear and succinct statement of the case (pp. 184-185 Tr.):

> "My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want or vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally

or specifically advised of the rights or interests of the plaintiff."

To conclude, a vital distinction exists between provisions against assigning contracts, or interests therein, and provisions against assigning moneys payable thereunder after performance of the work.

No covenant is necessary to prevent assignment of an interest in the contract without the consent of the owner. Non-assignability without consent is engrafted by the law upon every contract involving personal skill and responsibility. An assignment without consent of an interest in such a contract, carries with it no rights against the owner; and, likewise, carries with it no interest in the fruits of the contract when the contractor has failed to perform any work or earn any money under it. That's *Burck v. Taylor.*

But no such prohibition is implied against the assignability of moneys earned by performance, and which are a debt due from the owner to the contractor. Such a prohibition would be contrary to common right, and should never be inferred. The intention to create it should be clear and compelling. No such intention appears from the language of this contract. A provision to the effect that the contractor *shall not assign any of the moneys payable under the contract* without the consent of the Board of Public Works, has been held, in every well considered opinion, and in *every case in which the construction was necessary to the*

decision, to prohibit the assignment of *any interest in the contract,* including only those moneys which are *inseparable from the performance* of the contract, and which can have no existence apart from the doing of the work under it. This, we submit, is the *ratio decidendi* in all the well considered cases, cited in this petition, including *Burck v. Taylor.*

We are unable to find any authority for the *dicta* in the decisions cited to support the ruling of this Court. They stand alone. A careful reading of the opinions shows that they purport to stand on *Burck v. Taylor,* but that the point of the decision in *Burck v. Taylor* has been misconceived. It is a significant fact that no case prior to *Burck v. Taylor* enunciates the doctrine applied in the case at bar. This fact, in itself, would seem sufficient reason for a rehearing, especially in view of the fact that this Court has not had the benefit of the research of counsel.

Appellee respectfully submits that it is entitled to a rehearing of this case.

Dated, San Francisco,
May 22, 1914.

Respectfully submitted,

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CHAS. J. HEGGERTY,
JAMES B. FEEHAN,
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Attorneys for Appellee and Petitioner.

Contents.

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY (a corporation), bankrupt,
Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),
Appellee.

APPELLANTS' REPLY TO APPELLEE'S BRIEF ON PETITION FOR A REHEARING.

By leave of court, appellants respectfully make reply to the brief of counsel for appellee on petition for rehearing, filed May 25, 1914, as follows:

I.

THE PARAGRAPH CONCERNING TERMINATION CONTAINS A SAVING CLAUSE.

Counsel in a cause at bar who leaves out of his discussion an important fact which would, or might, if touched upon, turn the argument against him,

or alter materially the premises upon which argument is predicated, seems blind to the dangers that beset him.

Counsel's argument, beginning on page 6, is that an assignment of the payments under the contract without consent was *at most* merely a breach of a condition of the contract which the contractor was required to *perform,* and that the contractor's failure or neglect to *perform* it could be taken advantage of only by termination of the contract, leaving the assignee to enjoy the fruits of his prohibited assignment. Counsel relies in the argument upon the general provision of the contract giving the city the right to terminate the contract if the contractor should neglect or fail to *perform* any of its conditions (by him required to be performed, of course) as appears on page 24 of the supplemental transcript of record. And counsel relies as a matter of law to sustain this position, upon the theory that the provision in question applies to the matter of assignment and that it is exclusive, and gives rise to a condition of the contract to which the court can and must apply the maxim: *"Expressio unius est exclusio alterius,"* so as to exclude any other legal consequence (than termination) from flowing from a contractor's unauthorized assignment, and, also, because counsel can see in it as a matter of *legal construction,* a purpose to consider the right of the city and the contractor, *and nobody else.* Then counsel proceeds to build his argument upon this premise, *without calling attention to or in any way noticing*

that part of the clause in question which distinctly negatives any intention on the part of the contracting parties to make the provision exclusive or to in any way limit the otherwise legal effect of a failure to obtain consent. The clause in question contains the following words:

"Whether Any Alternative Right Is Provided or Not."

The full paragraph is as follows:

> "Should the contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right *whether any alternative right is provided or not,* to declare the contract terminated."

So, the right to terminate the contract by its very terms, is not to exclude any other right (provided by law or otherwise), which the parties or their assigns may have or to which the contract may give rise. *Which saving clause is an important fact that counsel omits to consider in his argument.* Therefore, in the very beginning, by a mere reading into the argument the saving clause which counsel omits to mention, the whole theory of his argument, wherein he believes he sees a purpose on the part of the contracting parties to limit the effect of failure to obtain consent to a possible termination of the contract by the city, falls for lack of a premise upon which to predicate such an argument or theory.

Therefore, the petition for rehearing should be denied.

II.

CASE OF BURNETT v. MAYOR DISTINGUISHED.

In further support of his argument, counsel refers to the case of Burnett v. Mayor & Aldermen of Jersey City, 31, N. J. Eq. 341, and argues that the facts in that case are almost identical with those in the case before the court.

But the facts in the Burnett case, although somewhat similar, were *not* identical, nor *almost* identical, with the facts in the case at bar. And the point of dissimilarity between the facts in the Burnett case and the facts in the case at bar appears exactly with respect to the provisions of the contracts in that case and in this, as to the consequences incident upon failure to obtain consent. Said dissimilarity consists in this, that in the Burnett case in the *same paragraph and as a part of* the provision prohibiting assignment without consent (which paragraph does not contain any *saving clause* and is so drawn that the clause relating to termination *could apply to nothing else in the contract*) it was provided that a violation of the provision against assignment should give the city the right to notify the contractor to discontinue work; whereas in the case at bar the provision prohibiting assignment, *both legally and equitably,* stands by itself and alone; and the provision giving the right to the city to terminate the contract is in most general terms and *does not refer to the matter of consent at all;* but, on the contrary, stands by itself, under a separate heading, relating to termi-

nation of the contract for the failure of the *contractor* to *perform* the conditions of the contract. In the case at bar it is a general clause referring to the *performance* of the work under the contract and to conditions to be *performed* by the contractor, under the contract, and *which contains a saving clause protecting and preserving the existence of every "alternative right", so that the right to terminate shall not be construed to be exclusive.*

Therefore, in the two cases the contracts not being similar, but quite *dissimilar,* in respect of the remedies provided in case of assignment without consent (one being limited to termination, and the other expressly negativing any such limitation) the Burnett case is not in point.

III.

GENERAL PARAGRAPH CONCERNING TERMINATION NOT TO BE CONSTRUED AS EXCLUSIVE OR AS A LIMITATION.

Furthermore, even without the saving clause, (against the remedy of termination being construed as exclusive) the provision for the remedy of *termination,* appearing in this contract, is a general, and not a specific provision and, *therefore,* should not be construed to be exclusive. In such case the maxim *"Expressio Unius"* is not applicable.

In Strauss v. Yeager (Indiana, 1911) the plaintiff sued upon a contract for the purchase of land

to recover an installment of the purchase price. The contract contained a provision, relating to remedies, to the effect that either party in case of failure to perform by the other, might enforce specific performance or recover damages for the default. The question arose whether the maxim *"Expressio unius est exclusio alterius"* applied to the provisions of the contract relating to the remedies so as to limit the plaintiff to an action for specific performance or damages as provided in the contract and so as to prevent his suing on the contract to recover the purchase price. It was held that the maxim did not apply. The court said:

> "The reason for this rule is stated in 2 Lewis' Sutherland Statutory Construction (2d Ed.), Paragraph 491, as follows: 'Expressio unius est exclusio alterius. This maxim, like all rules of construction, is applicable under certain conditions to determine the intention of the lawmaker when it is not otherwise manifest. Under these conditions it leads to safe and satisfactory conclusion; but otherwise, the expression of one or more things is not a negation or exclusion of other things. What is expressed is exclusive only when it is creative, or in derogation of some existing law, or of some provision in the particular act.' * * *
>
> "We do not feel justified in extending the application of this maxim to a subject where it has not been applied so far as we are able to ascertain, and especially so as the reason of the rule does not seem to justify such application."
>
> Strauss v. Yeager, 93 N. E. (Indiana), pp. 881, 882.

Applying this precedent to the argument made by appellee in its brief, it will be observed that the alleged provision of the contract in the case at bar relating to remedies is wholly *general, not creative,* nor in derogation of any existing law or other provision of the contract and *expressly,* by its terms, *provides* that the right to declare the contract terminated shall not be construed to be exclusive by reserving that right *"whether any alternative right is provided for or not"!*

Therefore the maxim would not apply to such a contract as this.

IV.

PARAGRAPH CONCERNING TERMINATION NOT APPLICABLE TO QUESTION OF NON-ASSIGNABILITY OF PAYMENTS.

Moreover, the provisions on page 24 of the supplemental transcript relating to termination of the contract cannot be applied to the facts in the case at bar at all (and were not intended so to apply) because said provisions look to the termination of the contract in case of *the contractor's neglect or failure to perform,* only, the plain purpose thereof being to conserve the active performance of the positive conditions of the contract by the contractor, with reference to the work itself, which are numerously apparent in the supplemental transcript.

Now, there is no *neglect* or *failure* to *perform* any positive condition of the contract involved in the

contractor's making an assignment without obtaining consent of the Board of Public Works. The provisions of the contract with reference to consent were entirely *negative* (8 Cyc. 558) and not provisions which the contractor was required actively to *perform* or in reference to which any *act* at all was *required* of him; and consequently were not conditions of the contract for which a *neglect or failure to perform* would entitle the city to terminate the contract and take possession of the work.

Obviously the contractor could execute a paper purporting to be an assignment without the knowledge of the Board of Works, as was done in the case at bar. *Of what avail, then, would be the right to terminate the contract for the breach of the provision against assignment without consent, if such purported assignment be held legally or equitably valid, and the Board of Works did not know anything about it?*

So, either this provision requiring consent could have no operative effect whatever (if the clause concerning termination be applied) and might as well have been left out of the contract; or it is a self executing condition precedent, making an attempted assignment, without consent first obtained, absolutely null and void, legally and equitably.

On the contrary, the provision that the contractor shall not assign without consent has nothing to do with *performance* of the conditions of the contract by the contractor, but is an absolute inhibition, neg-

ative in character, upon the contractor's making any assignment at all, the effect of which is to make the contract unassignable legally or equitably and to deprive him in the first instance of any right at all to assign the contract or any of the payments thereunder or his claim thereto, either legally or equitably, "unless" that right shall be subsequently conferred upon him by new agreement, if and when he shall have first *asked and obtained* consent; i. e. the effect is to make the contract and payments absolutely unassignable in law and in equity, without any condition whatever which the contractor is *required* to *perform* concerning it. In other words, it was not a part of the contractor's duties of *performance* under the contract either to assign his payments or to obtain consent to any assignment. The city was not interested in making that an *act* or *condition* of *performance* required of the contractor, *because* the contract and the payments had been made absolutely unassignable, legally and equitably, by agreement of the parties appearing elsewhere in the contract.

It was a *condition precedent,* so far as the contractor's right to assign payments was concerned, because it called for the performance of some act, namely, *consent* obtained, before any assignment, legal or equitable, could take effect (8 Cyc. 558). It was, therefore, *self executing,* and not a condition imposed upon the contractor, which it could be said he was required to *perform.*

Consequently the paragraph concerning failure or neglect of the contractor to *perform* the *conditions* of the contract could have no reference to the subject of non-assignability.

Under such circumstances his attempted assignment without first having obtained consent was an attempt to transfer to the Portuguese-American Bank a right which he himself did not have, the result of which right, logically and legally is a *nullity.*

Therefore, the *performance* of the contract or its conditions, required of the contractor, has nothing whatever to do with the question of assignment now before the court; and hence the new matter concerning the *additional* remedy of *termination* for failure to *perform, now imported into the record for the first time on petition for rehearing,* is not material and has no bearing.

The conclusion reached by the court in its opinion, that the contract and payments were unassignable either legally or equitably, is the correct one, therefore. Hence, the petition for rehearing should be denied.

V.

OPINION OF CALIFORNIA DISTRICT COURT OF APPEAL.

The District Court of Appeal of the State of California on May twenty-ninth, 1913, in construing a contract made by the City and County of San Francisco, containing a provision such as is con-

tained in the contract in the case at bar (*an exactly similar contract*) was of the opinion that an assignment made in violation of the express provision of the contract not to assign payments without consent of the Board of Public Works was absolutely *null and void.*

The following is quoted from the opinion of the court in that case which accords fully with the decision of this court in the case at bar:

> "There seems no valid reason for denying that parties may legally agree and bind themselves that such contract shall not be assigned. There is nothing in the statute to prohibit an agreement to that effect, nor is it opposed to any principle of sound public policy." * * *
>
> "The assignment, however, in violation of the express provision of the contract, under the authorities, was null and void, even as to respondent company."
>
> Butler v. San Francisco Gas & Electric Co., May 29, 1913, Civil No. 1053, Vol. 16, C. A. D., pages 946, 949, 953.

VI.

APPELLEE'S ARGUMENT BEGS QUESTION CONCERNING EFFECT OF PROHIBITION OF BOTH LEGAL AND EQUITABLE ARGUMENTS.

Appellants are not tempted to re-argue the case. It is desired to point out, however, that in citing authorities (from which counsel in his brief quotes copiously), the argument of counsel for appellee is,

in a vital respect, open to the charge of "begging the question"; because in his argument in discussing the authorities counsel does not compare the facts of the case under discussion with the facts of the case at bar.

In its opinion this court examined and discussed the cases referred to by counsel in his brief on petition for rehearing and brushed them aside as not in point, for this very reason.

The court says:

> *"Those cases are not in point for the reason that here the prohibition is against both the legal and equitable assignment of the money."*

This is the point which counsel persistently ignores, the question which counsel always begs in his discussion, namely, that the prohibition in the case at bar is against the equitable as well as the legal assignment and also that it is against not only the assignment of the payments, but also against the assignment of the contractor's *claim* to the payments, thus making the contract and payments, by distinct agreement of the parties, absolutely unassignable in law and in equity.

And thus the distinction by *inference* which appellee seeks to draw between provisions prohibiting assignments of the contract and of moneys payable under it is impossible to be drawn concerning this particular contract, because in this particular contract the provisions are so plainly stated as not to leave any room for inference.

For convenience the two provisions are here given:

> "SUB-CONTRACTS. The contractor shall constantly give his personal attention to the faithfull prosecution of the work; he shall keep the same under his personal control and shall not assign by power of attorney or otherwise, nor sublet the whole or any part thereof, without the consent or authorization of the Board of Public Works." (Tr. p. 268.)
>
> * * * * * *
>
> "No sub-contract shall relieve the contractor of any of his liabilities or obligations under this contract. He shall not, either legally or equitably, assign any of the moneys payable under this contract or his claim thereto unless with the like consent of the Board of Public Works." (Tr. p. 269.)

Thus the two inhibitions, the one against assignment of the contract for personal services or work, essentially unassignable, and the other against assignment of the moneys payable under the contract or the contractor's claim thereto, are placed *by the particular contract in the case at bar,* upon like footing.

The provision against assignment is not as to one only, nor as to both jointly, but is as to *each.* Nor is language of prohibition used as to one which is not used *also* as to the other.

Here are plain, unequivocal, *unlimited* prohibitions upon assignment of the work, *also* of moneys payable under the contract, *also* of the contractor's claim to moneys payable under the contract, *both* legally and equitably.

A more unlimited purpose to *absolutely prohibit* assignments could hardly be expressed in language. IF IT BE POSSIBLE TO MAKE A CONTRACT AND THE PAYMENTS THEREUNDER ABSOLUTELY UNASSIGNABLE BY ANY WORDS THE PARTIES MAY USE, THEN THIS HAS BEEN DONE IN THE CASE AT BAR, BECAUSE STRONGER LANGUAGE COULD NOT WELL BE IMAGINED.

What more would it seem necessary to add, what other words necessary to use, to express an *unlimited* purpose to prohibit? *Obviously nothing more is required.*

Then, certainly, what is argued in the petition for rehearing concerning cases where the court is "able to discern a limited purpose, in case of a breach of the provision against assignment", or concerning the assignment of executory contracts, or of payments where the provisions against assignment without consent are limited, or only against legal and not equitable assignments, is of no persuasive moment, not being in point.

The contract and its payments (otherwise assignable if you please) were made absolutely *unassignable* legally and equitably by agreement of the parties, so that nothing existed which could be assigned *unless* (the contract uses the word "*unless*") the parties should bring it into existence as an assignable thing by subsequent mutual agreement, namely, application for permission to assign or assignment by one *consented to* by the other.

VII.

GENERAL PROVISIONS CONCERNING TERMINATION SHOULD NOT NOW BE CONSIDERED, BECAUSE NOT HERETOFORE RELIED ON OR CALLED TO NOTICE.

A reference to appellant's reply to appellee's petition for rehearing, filed May 17, 1914, in this court and cause will disclose the piecemeal method in which appellees have brought to the attention of this court the matters which they now urge as reasons for a rehearing.

The record discloses affirmatively that the general provisions relating to termination of contract printed on page 24 of the supplemental transcript of the record were brought to the attention of this court, for the first time in a printed petition for rehearing filed by the appellee in this court on the seventh day of April, 1914, and that said provisions were never at *all called to the attention of the court below.*

The reference now to the provision of the contract concerning termination probably is a mere afterthought, because *said provision was never mentioned by anyone connected with the case at any time until it appeared in appellee's petition for rehearing.* **It was not mentioned in appellee's two briefs on the original hearing in this court.**

On the taking of testimony before the referee it was stipulated that all the specifications should be considered in evidence, and that they might be referred to by counsel on argument, but that they

need not be copied *"unless" counsel desired to read some part of them which he wanted "to call attention to"*. The stipulation (in part) is as follows (Tr. p. 266, fol. 288):

> "It is agreed that those specifications, in part or in whole, may be referred to by counsel on argument in this case, and they may be admitted in evidence, *but that they need not be copied unless counsel desires to read some part of them which he wants to call attention to.*"

Then at the same moment and *pursuant to that stipulation* counsel for appellee read in evidence the very portion of the specifications containing, among other things, the provision that the contractor should not assign or sublet the work in whole or in part and also that he should not either legally or equitably assign any of the moneys payable under the contract or his claim thereto unless with consent of the Board of Public Works (Tr. pp. 268, 269), without referring at all, then or at any subsequent time, to the clause concerning termination.

Under this stipulation and in this state of the case it was the privilege, at least, of counsel to have inserted the general provision relating to termination of the contract *if he desired "to call attention to" it,* because it was the letter and spirit of the stipulation that whatever counsel wanted "to call attention to" should be copied into the record. How Else Could the Court Notice It? Counsel for appellee neglected to do this, *then or at any subsequent stage of the proceedings,* did not include

nor attempt to include the alleged evidence in the statement of proceedings and testimony which counsel for appellee stipulated should be settled and allowed by the court (Tr. p. 273) and which contains a statement *approved by appellee* (Tr. p. 212) in words as follows:

> "That all of the testimony concerning the alleged assignment of the fourth progress payment on the Fourth and Kentucky streets contract of the Metropolis Construction Co., a corporation, in dispute in this case, taken or used on the hearing of this cause before the referee, is as follows, to wit:" (Tr. p. 212, fol. 238.)

Nor did appellee include the alleged provision in its praecipe as to the transcript filed March 3, 1912 (Tr. p. 6).

The record was filed May 14, 1913, and the printed transcript July 1, 1913. Over *four months* thereafter (November 11, 1913) appellee, taking the right to close the argument, which really belonged to appellant, filed its second, *and the final* brief in the cause, in this court.

During all this time no hint was made by appellee, not a word said, written or printed, concerning the now alleged provision concerning termination of the contract for non-performance.

Appellee filed *two briefs,* therefore, after the question was presented in appellants' opening briefs, both on the negative of the proposition, and waited until the cause had been decided in this court and an opinion written and filed, *without*

ever having made referencse or called attention of the court below or of this court to the said provision relating to termination of the contract in case of failure on the part of the contractor to perform.

Hence, it is fair to infer appellee did not rely on the alleged omitted evidence nor desire to call it to the court's attention, and to conclude that the petition should be denied.

Although there is no merit in the petition for rehearing, with or without the matter now for the first time brought to the attention of this court on page 24 of the supplemental transcript of record, nevertheless counsel's failure to call attention to said provision of the contract on the original hearing of this cause in this court (where the point was brought to his attention and counsel given full opportunity to do so) is good and sufficient reason why the petition for rehearing should be denied.

Reese Folding Machine Co. v. Fenwick, 72 C. C. A. 43-44.

VIII.

DECISION IS ACCORDING TO SUBSTANTIAL JUSTICE.

The proposition that solemn and explicit agreements in writing between individuals inhibiting assignments or in other respects will be upheld and enforced in law and in equity and binding upon the

parties and all who deal with them in reference to the contract is not surprising or novel.

It is the principle of decision in the case of Burck v. Taylor (152 U. S. Sup. 649), and its statement and enforcement in this case is, we think *according to the right of the matter.*

Appellants, therefore, pray that the petition for a rehearing be denied.

San Francisco, California,
June 3, 1914.

Respectfully submitted,

A. F. Morrison,
P. F. Dunne,
W. I. Brobeck,
Gavin McNab,
B. M. Aikins,
Milton J. Green,
Counsel for Appellant, John Daniel, Trustee, Etc.

C. A. S. Frost,
Counsel for Appellant, Paul I. Welles.

(The italics in the foregoing brief are supplied by counsel.)

No. 2273

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

PAUL I. WELLES and JOHN DANIEL, Trustee of METROPOLIS CONSTRUCTION COMPANY (a corporation), Bankrupt,

Appellants,

vs.

PORTUGUESE-AMERICAN BANK OF SAN FRANCISCO (a corporation),

Appellee.

APPELLEE'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Appellee respectfully petitions for a rehearing of this cause, and assigns therefor the following grounds:

First. Accident and surprise which prevented appellee from bringing up before this Court a full and fair record on the point upon which the decree herein has been reversed.

Second. Novelty and unexpected importance of the point upon which the decree herein has been reversed, fairly entitling appellee to have the cause reopened for further argument.

FIRST GROUND.

To a clear understanding of the first ground urged by appellee for a rehearing, and a proper appreciation of its merits, a brief statement of the position of appellants, with reference to the point that the moneys due under the contract were not assignable without the consent of the Board of Public Works, is indispensable.

Some time prior to February 2, 1912, counsel for appellant Paul I. Welles raised the objection, rather vaguely and indirectly, that an assignment would not be inferred by the Court because, among other reasons, the contract provided that the contractor should not assign moneys payable under it without the consent of the Board of Public Works, and that the Board's consent was not obtained.

On February 2, 1912, counsel for appellee filed the opening brief on motion for confirmation of the Referee's report; and, assuming that counsel for Mr. Welles might attack the validity of the assignment for lack of consent, briefed this point to some extent.

Then, on February 15, 1912, on the same hearing, counsel for Mr. Welles, in reply, pointed out

that counsel for appellee were in error in assuming that such was his contention, in the following words:

> "It is not contended, as defendant states on page 4, that a demand could not be assigned without the *consent* of the Board of Public Works, but it is contended that such an assignment will not be inferred by this Court under the circumstances. And so the Bank wasted its discussion of that point, on pages 4, 5 and 6 of the brief." (Referring to appellee's said brief of February 2, 1912.)

The above language is clear when it is understood that the two important and vital questions before the Court were those of assignment and priority. Appellants' contention was that an assignment without consent would at most be a breach of contract, and that an assignment would not be inferred under such circumstances. In other words, they argued that the Court should not infer that the contractor intended to violate his agreement.

The point, therefore, that there could be no assignment of the fourth progress payment without the consent of the Board of Public Works was not presented in its present form; and this, in fact, was the last heard of it, until the hearing of the exceptions to the final report of the Referee came on before the District Court. At that time counsel for Mr. Welles again disavowed the theory that the rights of the contractor were not capable of assignment on December 6, 1910. This statement was elicited by a finding in the Referee's report.

The brief on this hearing is dated August 17, 1912, and is entitled "Argument of Complainant on hearing of his Exceptions to Report of Examiner, filed July 16, 1912; and his reply to said Examiner's Conclusions of Law". In this brief, pages 8 and 9, we find the following language:

> "Complainant's argument and position are not fairly stated in the examiner's report, on this point. It is not contended that the rights of the construction company, whatever they were, were not capable of assignment on December 6, 1910. The contention is rather as follows: "

Then follow three reasons why the Court will not *infer* an assignment, or *construe* the transaction to be an assignment.

With this last reference to the matter, the point was never again mentioned directly or indirectly, then or thereafter; and was never urged in its present form until the litigation reached this Court on appeal, and until *after the transcript had been filed in this Court.*

Rule 11 of this Court provides:

> "The plaintiff in error or appellant shall file with the clerk of the court below, with his petition for the writ of error or appeal, an assignment of errors, which shall set out separately and particularly each error asserted and intended to be urged. * * * When this is not done counsel will not be heard, except at the request of the court; and errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

No assignment of error was taken by appellants to the conclusion of the Referee, or the conclusion of the District Court, that the provision against assigning moneys payable under the contract was solely for the protection of the city and can only be invoked by the city, and that such as assignment is not void because of the failure to obtain consent of the city.

Counsel for appellants drew up their exceptions and specifications of error with great particularity, touching every possible point directly and carefully, except the point on which this case has been reversed. This is also potent evidence of the manner in which this point was viewed by appellants until the filing of the opening brief on appeal.

The importance of the foregoing statement becomes apparent, when considered in connection with the fact that if the point had been made prior to the filing of appellants' brief on this appeal, appellee could have prepared the record to meet it.

The *entire "specifications"* annexed to the contract between the Board of Works and the Construction Company were in evidence before the Referee and the District Judge, under stipulation that they could be referred to without the necessity of copying them (p. 266 Tr.). These so-called "Specifications" are headed "General Provisions" in the contract, and consist of 20 pages of matter printed in imitation of typewriting. In these "General Provisions", at page 11, occurs the paragraph forbidding the contractor to assign any of

the moneys payable under the contract without consent of the Board of Public Works.

But, at page 18 of the same "Specifications", the following provisions occur:

> "All conditions of this contract are considered material and failure to comply with any of said conditions on the part of the contractor shall be deemed a breach of the contract.
>
> Should the Contractor neglect or fail to perform any of the conditions of the contract, the Board of Public Works shall have the right, whether any alternative right is provided or not, to declare the contract terminated.
>
> The passage of a resolution by the Board of Public Works stating that the contract is terminated and the service of a copy of said resolution upon the Contractor shall be deemed a complete termination upon the contract.
>
> Upon the contract being so terminated, the Contractor shall immediately remove from the vicinity of the work, all materials and personal property belonging to him, which have not already been used in the prosecution of the work, or which is not in place in the work and he shall forfeit all sums due to him under the contract and both he and his sureties shall be liable upon his bond for all expense and damages caused the City and County of San Francisco by reason of his failure to complete the contract."

In making up the record on appeal, appellee was bound by new Equity Rules 75 and 76 to omit what was not deemed material, and for that reason did not encumber the transcript with the whole con-

tract between the City and the Construction Company.

This omission of the contract from the record was brought about, as above set forth, by the admission of counsel for Mr. Welles in the Court below, that the rights of the Construction Company, whatever they were, *were assignable* on December 6, 1910, but that such assignment, if made, would constitute a breach of contract.

It will readily be understood, on reading the above portions of the "General Provisions", why counsel for Mr. Welles *did not claim* in the Court below that the progress payments due to the company could not be assigned by it without the consent of the Board of Works.

These omitted portions specifically provide what will be the result, or penalty, of a breach of any condition of the contract. This Court has not had the benefit of the light of these provisions in deciding this appeal,—provisions which have a decisive bearing on the point on which the case has been reversed, as shown by the following authorities.

If from the whole contract, the Court is able to discern a limited purpose on the part of the contracting parties, in case of a breach of the provision against assignment, then the rule declared in *Hobbs v. McLean,* 117 U. S. 567, and *Burck v. Taylor,* 152 U. S. 635, must prevail.

This rule is stated in *Burck v. Taylor* to be:

> "Expressio unius est exclusio alterius. The express declaration that so far as the United

> States are concerned, a transfer shall work an annulment of the contract, carried, by clear implication, the declaration that it shall have no such effect as between the contractor and his transferee. In other words, as to them, the transfer is like any other transfer of property, and controlled by the same rules. Its invalidity is only so far as the Government is concerned, and it alone can raise any question of the violation of the statute."

In *Burnett v. Mayor and Aldermen of Jersey City,* 31 N. J. Eq. 341, a contract between the city and contractor provided that the contractor should not assign, by power of attorney or otherwise, any of the moneys payable thereunder unless by consent of the Board of Public Works, to be signified by endorsement on the contract, and that for a violation of this provision the Board would have power to notify the contractor to discontinue all work, and take the work over into their own hands and complete it at the contractor's expense, the cost to be deducted from the moneys due or to become due to him under his contract.

It was contended in this case that an assignment without consent was of no effect as against subsequent creditors giving notice under the lien law. The Court held (pp. 352-353):

> "The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion.

> But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and, permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution."

In *Griggs v. Landis,* 21 N. J. Eq. pp. 510-511, the Court states the rule as follows:

> "But I apprehend such collateral covenant will never be thus enforced, where it appears upon the face of the contract that the prohibition to assign is not the main purpose of the covenant, but a mere incident to and security for such purpose. It is the province of a court of equity to ascertain what is, in truth, the real intention of the parties, and to carry that into effect."

There are innumerable cases to the same effect, but we quote from the above merely to show that upon a fair record the decree of the District Court should be affirmed.

We desire to call particular attention to the fact that counsel at that time, knew and admitted the exact intent and legal effect of the provision of this contract prohibiting assignment of moneys payable thereunder, as settled beyond controversy by these decisions.

As the record can be made to show these facts, we respectfully submit that appellee is, in furtherance of justice, entitled to a rehearing and to an order permitting it to prepare and file in this Court a supplemental transcript embodying

the whole contract and specifications under which the demand in suit became due. Otherwise, appellee, having in fact an assignment in *good faith,* will be technically deprived of its rights, and solely because of an accidental omission from the record in this Court of certain portions of the "General Provisions", which were in evidence in the Court below. There, counsel for complainant Welles admitted that the company could assign its rights on December 6. 1910, because the record there showed that it could do so; here, counsel deny that the company could assign those rights, because the record here fails to show that it could do so.

Furthermore, a reversal of the decree, through the accidental omission referred to, would be particularly drastic and unjust to the appellee, in as much as other litigation, involving two other demands against the city for over $31,000.00, is pending, which would undoubtedly be unfavorably influenced by the authority of this decision.

The necessity of an amendment to the record did not become apparent until the decision of this Court was rendered. Appellee believed, and had every reasonable ground to believe, that the point urged on the appeal would not be considered by this Court in the absence of a specific exception reserved to the finding of the Referee before the District Court. No such exception was taken, and the record contains none. As we have stated, the only exception taken was in argument; *and that exception was to a conclusion of the Referee in*

intimating that counsel for Mr. Welles had questioned the assignability of the demand, when he in fact admitted its assignability.

New Equity Rule 76 provides as follows:

> "In preparing the transcript on an appeal, especial care shall be taken to avoid the inclusion of more than one copy of the same paper and to exclude the formal and immaterial parts of all exhibits, documents and other papers included therein; and for any infraction of this or any kindred rule the appellate court may withhold or impose costs as the circumstances of the case and the discouragement of like infractions in the future may require. Costs for such an infraction may be imposed upon offending solicitors as well as parties.
>
> If, in the transcript, anything material to either party be omitted by accident or error, the appellate court, on a proper suggestion or its own motion, may direct that the omission be corrected by supplemental transcript."

SECOND GROUND.

We respectfully submit that this case should be reopened for further argument on the point upon which the decree has been reversed. Up to the time when the appellants took advantage of the deficiencies in the record to raise and press the point in argument before this Court, there was no dispute,—as we have shown above,—about the assignability of the demand. The point having never been raised in the Court below, was not given any particular consideration by counsel. The three

points exhaustively considered were: Did the transaction constitute an assignment? Was the fourth progress payment due to the company from the city on December 5, 1910? And, was the minute order of December 12, 1911, the *law of the case?*

When the point was raised on this appeal for the first time, counsel for appellants had ample opportunity to prepare for its presentation, but counsel for appellee were at a serious disadvantage because of the shortness of the time at their disposal; the unexpected position assumed by appellants, and inability to foresee the action of this Court.

Under the circumstances it was only to be expected that the argument was not developed as it would have been under ordinary conditions of litigation.

In the first place, there is a difference to be observed between stipulations forbidding the assignment of the contract, and those forbidding the assignment of payments. The first are of the very essence of contracts for personal service, and, in the absence of express covenant, will be implied by law. The same rule must, obviously, apply to the case of parties claiming moneys by virtue of an assignment of such contracts, while they remain *executory,* and which moneys can be earned only by the performance of the work. This principle of law is well illustrated by the following quotations from *Burck v. Taylor* (152 U. S. pp. 649, 650):

> "It is unnecessary to hold that the contractor might not be personally bound upon his prom-

ise *made before the performance of the contract* to transfer a portion of his profits to any third party. Whatever liabilities he might assume by such a promise it would be an independent promise on his part, it would not let the promisee *into an interest in the contract.* It would give him no right to take part in the work, no right to receive anything from the state, and all that it would give him would be an independent right of action against the contractor for the failure to pay that which he had promised to pay; that contract remaining all the time the property of the contractor, subject to disposal by and with the consent to the state. To him alone the state would remain under obligations, and with him alone would the state be required to deal. In no way, by garnishment, injunction, or otherwise, could the promisee prevent the state from carrying out the entire contract with the contractor, paying to him the whole consideration, and receiving from him a full release. By the three instruments of January 31, May 9, and June 20, 1882, this contract was wholly transferred to and accepted by the defendant. *This was while the contract was executory and before the work was done,* and these transfers were with the written consent and approval of the state authorities, and by them the state in terms recognized 'Abner Taylor as the contractor, bound in all respects to carry out the contract with the state of Texas in like manner as the original contractor, Matthias Schnell, was bound.' In other words, by the consent of parties, and in accordance with express provisions of the contract, *before the work was done* Abner Taylor, the defendant, was substituted for Schnell as the contractor. It was precisely the same as though the contract with Schnell had been surrendered and a new one made with Taylor. *The contract was still exe-*

cutory: nothing had been earned by Schnell, and nothing was due to him." (Italics ours.)

And at pages 652, 653, we read:

"It is true that in that assignment it was stipulated that the profits were 'to be divided as the interests of the parties appear under the contract, or to their heirs or assigns.' If Schnell, with Taylor, Babcock & Co., had under that assignment performed the contract with the state and had made profits thereby, it may be that this plaintiff after giving notice could have enforced both against Schnell and this defendant a one thirty-second of such profits, resting upon this stipulation for division among the parties or their assigns, but as Schnell *never earned any share in the profits* there is nothing upon which that stipulation can take effect. The profits which would have resulted if Schnell, with Taylor, Babcock & Co., had performed the contract might have been very different from that which did result from the performance of the contract by Taylor alone. It is a mistake to suppose that the profits to be derived from the performance of a contract, *as yet unexecuted,* are something separable from the performance—as a coupon is detachable from a bond—and can be set floating through the channels of commerce as a separate obligation. The profits are tied up in the contract to such an extent that the promise in respect to them becomes of value only when he who makes the promise *shall have earned the profits through the performance of the contract.* And when the contract, *being wholly executory,* is transferred to a third party who is accepted by the promisor in lieu of the original contractor, such third party enters upon the performance of the contract free from any disposition of the profits made

> by the original contractor before the substitution." (Italics ours.)

And again, at page 651, we read:

> "We have thus far rested the non-assignability of this contract, or any interest therein, to plaintiff's grantor upon the express stipulation of clause 26; but even in the absence of such a clause, it was not competent for Schnell, by his own act, and without the consent of the state, the other contracting party, to transfer any interest in this contract. It is a contract of that nature which is not susceptible of assignment without the consent of the other party."

Hence, contracts calling for personal services are *essentially* unassignable without consent. All that the contractor may do is to parcel out the purely ministerial portions of the work and agree to pay therefor, personally. The covenant against assignment in such a case adds nothing to the legally implied prohibition.

Such was the case of *Burck v. Taylor*. The assignment was prohibited, not only by the contract, *but by the policy of the law itself*.

But when money has been *earned* under a contract, by the *performance of the work* by the contractor, or a specific part thereof to which the payment is apportioned, does the policy of the law forbid assignment of that money, which is then *beyond* the control of the Board of Public Works and a *debt* due from the city to the contractor? So far, our examination of the authorities has

not disclosed a case so holding, and, certainly on principle, there can be no such prohibition. On the contrary, when money is earned, and the relation of debtor and creditor has been established, as was the case here when the Board of Public Works *approved* the demand in suit and *ordered* its *payment,* the policy of the law is in favor of the freedom of the owner to dispose of the demand in any way he sees fit. No rights of the debtor under the contract can be disturbed, and any prohibition against assignment of the money after it is earned would run counter to the policy of the law, and should be positive, clear and entirely incapable of a liberal construction in favor of the creditor.

The provision of the contract in this case is that the contractor

> "shall not either legally or equitably assign any of the moneys payable under this contract, unless with like consent of the board of public works" (p. 137 Tr.).

It is to be observed that the consent required is that of the *Board of Public Works.* Construction must be reasonable, and in favor of, rather than against, freedom of disposition. Now, the question arises, If it was the intent of the parties to prohibit the assignment of the moneys *after the work was done* and *after they were earned,* why should the consent of the *Board of Public Works* be required to an assignment made *after* the demand had left their hands, and *after* their *final action* thereon under the *charter?*

We submit that this question cannot be satisfactorily answered on the theory of appellants. No other reasonable construction can be placed upon this provision of the contract, than this: That any assignment of moneys *before* they were earned and ordered paid by the Board of Public Works, would require the consent of that Board.

The distinction between the forbidden assignment of a contract, or of moneys to be earned by the performance of the work thereunder, and the assignment of moneys already earned by performance, is clearly brought out in *Snyder v. City of New York,* 74 N. Y. App. Div. 421.

In that case a contract for public improvements provided that the contractor should not assign "any of the moneys payable under this contract" unless by and with consent of the commissioner of public works in writing. After the contractor became entitled to a progress payment the city cancelled the contract.

A claim for moneys *earned* under that contract was assigned to plaintiff without such consent, and an action was brought against the City of New York. The first point made by the city was that no cause of action vested in plaintiff as against defendant, as there could be no assignment without consent.

The Court held:

> "The clause in question is a restriction solely upon the assignment of the *contract as such* and not of moneys earned thereunder and which the city is bound to pay" (p. 426).

Moneys payable under the contract being construed to mean moneys *to be earned* by the performance of the contract, and inseparable from that performance.

This, we submit, is the proper construction, and the only rational construction which can be placed on the provision, without violating normal legal rights and the peculiar provisions of the contract before us.

It was of the essence of the contract under consideration in *Burck v. Taylor,* that no interest in the contract should be capable of assignment without consent. Schnell purported to assign to plaintiff's assignor *an interest in the contract.* No consent was had to this assignment. Neither Schnell nor plaintiff's assignor, nor plaintiff, performed any work under the contract. It was held that plaintiff acquired no interest in the contract as against the defendant Taylor, who had been *substituted* in place of the original contractor, Schnell, and who had *performed the work.* If the contractor was unable to carry out the contract, the state would have the undoubted right to have it carried out by a substituted party. This right would be impaired if the contractor could assign the contract without consent so as to give the assignee a claim to any interest therein; for if he could do so, a prior assignment might be asserted to deprive the substituted party of his compensation, and this right to secure a substituted contractor would be interfered with.

Burck v. Taylor decides that an assignment of *an interest* in the contract under consideration, without consent, was ineffectual, and not that a contractor cannot assign moneys that might become due him.

The cases of *Fortunato v. Patton,* 147 N. Y. 277; *Hackett v. Campbell,* 10 App. Div. N. Y. 523, affirmed in 159 N. Y. 537, and *Burnett v. Mayor and Aldermen of Jersey City,* 31 N. J. Eq. 341, directly pass upon provisions in municipal contracts forbidding assignment of moneys due under such contracts, and they decide that such provisions are for the benefit of the city only.

Hackett v. Campbell, supra, concerns a provision, contained in a contract between the board of education of the City of Yonkers and a contractor, to the effect that no assignment of any portion of the amount due upon the contract should be made without the consent, first had in writing, of a committee of the board of education.

It was held that the provision was one solely for the benefit of the board of education and its sole function was to prevent claims from being asserted against the city in the absence of its consent.

The contest was between a person who had an order for part of a fund, which was held to be an equitable assignment of moneys due the contractor, and various lien claimants. Consent to the assign-

ment had not been obtained. It was held that the assignee was entitled to priority.

The following excerpt is taken from the decision, page 525, 10 App. Div. N. Y.:

> "The appeal is based upon the provision of the contract quoted, the appellants' contention being that it forbids any assignment of moneys earned under the contract and effectually prevents the respondent's order from operating as an equitable assignment. To sustain their contention the appellants cite *Burck v. Taylor* (152 U. S. 634). We think the rule there applied has no application to the case before us. In *Fortunato v. Patten* (147 N. Y. 277) the Court of Appeals of this State decided that a similar provision in a contract with the city of New York was inserted solely for the benefit of the city, and that its sole function was to prevent any claim being asserted against the city in the absence of its consent.
>
> The court there distinguished between a provision forbidding the assignment of money due under a contract and one forbidding the assignment of the contract itself. The case of *Burck v. Taylor (supra)* was of the latter character. The case before us was of the first. The provision in the contract with Campbell was that no portion of the amount due on the contract should be assigned without the consent of the committee of the board of education, and the case cannot be distinguished in this respect from that of *Fortunato v. Patten.*"

Furthermore, it is to be noted that in no case has such an assignment been held *void.* Even in the case of *Burck v. Taylor,* which involved an assignment of a part of the contract itself, the Court, in its conclusion, states:

> "In conclusion, we hold that by the nature of the contract as well as its express stipulation Schnell was incapacitated from transferring an interest therein without the consent of the state; that the attempted transfers from him to A. A. Burck and from A. A. Burck to S. B. Burck created simply a personal obligation which could be enforced against him alone; that the assignments and transfers with the consent of the state vested the absolute and sole interest in the contract in the defendant, Abner Taylor; that the latter took without notice of plaintiff's claim; and that by his performance of the contract he acquired the right to the entire consideration promised by the state, and assumed no liability to Schnell, and no obligation to perform any promise which Schnell made to plaintiff or plaintiff's assignor."

Here the Court enumerate matters which are entirely incompatible with the idea that such an assignment would be absolutely void.

Likewise, in the following cases the Court held that such provisions must be specially pleaded in defense; even in a suit against the original party to the contract:

Burke v. Mayor of N. Y., 7 N. Y. App. Div. 128;

Episcopo v. Mayor of N. Y., 35 Miscel. N. Y. 623 (affirmed in 80 App. Div. 627).

The statement in *Devlin v. Mayor etc. of New York,* 63 N. Y. 8, that

> "Parties may in terms prohibit the assignment of any contract and declare that neither personal representatives nor assignees shall

> succeed to any rights in virtue of it, or be bound by its obligations",

while obiter dictum, is not applicable to the case at bar for the contract in case at bar does not in terms declare that assignees shall not succeed to any rights in virtue of it. In that case the Court held that the contract under consideration was assignable and permitted the assignee to recover against the city.

Likewise the statement from *Delaware County v. Diebold Safe Co.,* 133 U. S. 473, 488,

> "A contract to pay money may doubtless be assigned by the person to whom the money is payable, if there is nothing in the terms of the contract which manifests the intention of the parties to it that it shall not be assignable",

while obiter dictum, can not be said to mean that an assignment without consent, is void.

These statements merely affirm the right of a party to insert in his contract a provision against assignability so that an assignee without consent shall acquire no right of action against him. Furthermore, in each case, the assignee sued the *other contracting party,* the City of New York in one case and Delaware County in the other.

The decisions in the cases of *City of Omaha v. Standard Oil Co.,* 55 Neb. 337, *Murphy v. City of Plattsmouth,* 78 Neb. 163, *Suburban Electric Light Co. v. Town of Hempstead,* 38 App. Div. N. Y. 355, and *Deffenbaugh v. Foster*, 40 Ind. 382, are all based upon the proposition that an assignment of the

contract itself in violation of a provision against assignment will not entitle the assignee to recover against the other contracting party.

Except, in *Deffenbaugh v. Foster,* the defendants in all these cases were cities which had provisions against assignment inserted in their own contracts.

In *Deffenbaugh v. Foster,* supra, the plaintiff was the assignee of a contract for a street improvement which was assigned in violation of its provisions. He sued the property owner for the amount of the assessment. The Court decided that he could not recover and that the provision against assignment was to protect the city and the property owner against improper and unfaithful substitutes for the original contractor.

Mueller v. Northwestern University, 195 Ill. 236, concerns a contract for furnishing marble for a building belonging to the university and which contained a provision against assignment in the following words:

> "That the contractor shall not sell, assign, transfer or set over this contract, or any part thereof or interest therein, unto any person or persons whomsoever, without the consent in writing of the architects previously had and obtained thereto, and any such sale, assignment or transfer without such written consent of the architects first obtained thereto shall be absolutely null and void."

The plaintiff claimed as assignee of the moneys due the contractor and sued the university, *the other party to the contract,* after it had, in ignor-

ance of plaintiff's claim, made a partial settlement with the contractor. The Court decided that, upon the facts of the case, plaintiff had no assignment, and that if he had, it was in violation of the contract provision and that he could not recover against the university.

In *La Rue v. Groezinger,* 84 Cal. 281, the plaintiff sued to recover upon a contract made by defendant with plaintiff's assignor, by the terms of which defendant agreed to purchase grapes raised by plaintiff's assignor upon certain property. Plaintiff purchased the property and took an assignment of the contract. Defendant refused to buy any grapes from plaintiff, claiming that the contract was not assignable. The Court held that the contract was assignable.

Our point is, that such prohibitions do not make the assignments *void,* but merely *unenforceable* if the party in whose favor they exist sees fit to invoke them. They may be waived.

It is to be remembered that in this case Mr. Welles is not claiming an interest in the contract; whatever rights he may have to the demand flow solely from Section 1184 of the Code of Civil Procedure.

Therefore, if the assignment to the Bank was not *void,* it was good and enforceable until the defense of want of consent was set up by the city. Mr. Welles, in his complaint (p. 12 Tr.) alleges that neither the city nor any office, agent or depart-

ment thereof, made any claim to the demand or its proceeds. Auditor Boyle, in his amended return and answer (p. 67 Tr.) states

> "that the city and county of San Francisco makes no claim to said warrant, or demand, or any of the proceeds thereof, nor does this defendant make any such claims, and this defendant is merely a stakeholder."

The Trustee in his answer (p. 79 Tr.) adopts and admits the allegations of the bill of complaint.

The money has been paid into Court to await the final determination of the rights of the respective parties.

The case seems to fall squarely within the facts and decision of *Burnett v. Mayor and Aldermen of Jersey City,* 31 N. J. Eq. 341 (supra).

> "The assignment was not void, even as against the city, but voidable pro tanto only. The board of works could not deprive the assignees of their right under it. If deemed proper they could protect the interests of the city by taking charge of the work and appropriating the money on hand to its completion. But the city had the clear right to waive the enforcement of a provision in the contract inserted for its special benefit, and did so by omitting to give the required notice to the contractor, and permitting him to continue the work, as well as by bringing the fund into court and consenting to its distribution" (pp. 352-353).

With reference to the position of appellant Welles under Section 1184 of the Code of Civil Procedure, this Court, in the decision reversing the

decree herein, assumes that one of the grounds, if not the principal ground, of embodying the provision in the contract was to afford subcontractors a better opportunity to secure payment.

This cannot be so, for the following reasons: In the first place no such purpose appears from the contract itself; in the second place the charter of this city and county gives the Board of Public Works no authority to insert any such provisions in its contracts; and in the third place no such protection was necessary, as under Section 1184 the subcontractor could have given his notice at any time from the *commencement of his work* and until the contractor parted with his right to the money. The opinion of Judge Dietrich is a clear and succinct statement of the case (pp. 184-185 Tr.):

> "My first impression was that there were very strong equities in favor of the plaintiff, and that therefore the relief prayed for should be awarded if any legal reason could be found upon which to rest such a decree. But it appears that under the law he might have fully protected himself against the assignment to the bank and all other contingencies, by giving the notice to withhhold when he first entered upon the work. This he negligently failed to do; if such notice had been given the bank probably would not have made the advancements. While the installment or payment in controversy was earned by the labor and outlay of the plaintiff, it is also true that the bank parted with its money in reliance upon the security which it supposed it was getting in the assignment. One or the other of the

> claimants must lose, and so far as the equities are concerned, the loss should fall upon him to whose carelessness or want or vigilance it is due. There is no room for a contention that the bank was wanting in proper care, and, upon the other hand, as already suggested, the plaintiff was careless in not giving the simple notice until after the payment had been earned and the claim therefor in favor of the contractor had been approved. Added to this is the further consideration that in the contract with the city it was expressly provided that it should not be sub-let without first obtaining the approval of the city authorities. No application for such approval was ever made, nor until the belated notice to withhold was given were any of the city authorities ever formally or specifically advised of the rights or interests of the plaintiff."

To conclude, a vital distinction exists between provisions against assigning contracts, or interests therein, and provisions against assigning moneys payable thereunder after performance of the work.

No covenant is necessary to prevent assignment of an interest in the contract without the consent of the owner. Non-assignability without consent is engrafted by the law upon every contract involving personal skill and responsibility. An assignment without consent of an interest in such a contract, carries with it no rights against the owner; and, likewise, carries with it no interest in the fruits of the contract when the contractor has failed to perform or earn any money under it. That's *Burck v. Taylor.*

But no such prohibition is implied against the assignability of moneys earned by performance, and which are a debt due from the owner to the contractor. Such a prohibition would be contrary to common right, and should never be inferred. The intention to create it should be clear and compelling. No such intention appears from the language of this contract. A provision to the effect that the contractor *shall not assign any of the moneys payable under the contract* without the consent of the Board of Public Works, has been held, in every well considered opinion, and in *every case in which the construction was necessary to the decision,* to prohibit the assignment of *any interest in the contract,* including only those moneys which are *inseperable from the performance* of the contract, and which can have no existence apart from the doing of the work under it. This, we submit, is the *ratio decidendi* in all the well considered cases, cited in this petition, including *Burck v. Taylor.*

We are unable to find any authority for the *dicta* in the decisions cited to support the ruling of this Court. They stand alone. A careful reading of the opinions shows that they purport to stand on *Burck v. Taylor,* but that the point made in *Burck v. Taylor* has been misconceived. It is a significant fact that no case prior to *Burck v. Taylor* enunciates the doctrine applied in the case at bar. This fact, in itself, would seem sufficient reason for a re-examination, especially in view of the fact that this Court has not had the benefit of the research of counsel.

Appellee respectfully petitions for a rehearing of this case, and requests that this Court direct that, as provided in New Equity Rule 76, the omission of said "specifications" or "General Provisions" of said contract from the transcript be corrected by a supplemental transcript containing the whole of said contract and specifications in evidence in the Court below, or such portions thereof as may be deemed material to a determination on the merits of the point upon which the decree herein has been reversed.

San Francisco, California,
April 6, 1914.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel in the foregoing case; that in my judgment the petition herein is well founded and is not interposed for delay.

CHAS. J. HEGGERTY,
Of Counsel for Appellee and Petitioner.